CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 243.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY

vs.

EDGAR C. WILLIAMS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MARCH 31, 1906.

(20,162.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1906.

1 United States Circuit Court of Appeals, Eighth Circuit.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Plaintiff in Error,

vs.

EDGAR C. WILLIAMS, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Missouri.

The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the City of St. Louis, Missouri, on the 22nd day of March, A. D. 1906, certifies that the record on file in the action above entitled, which is pending in this court upon a writ of error duly issued to review a judgment rendered in this action in favor of the defendant in error, in the United States Circuit Court for the Western District of Missouri, discloses the following facts:

The judgment which the writ of error challenges was rendered after a trial and a verdict of a jury for $5,000 damages caused to the defendant in error, who will hereafter be called the plaintiff, by the negligence of the servants of the railway company, the defendant below, in the operation of a cattle train, in the caboose of which the plaintiff was riding under this contract:

"Burlington Route.

Live Stock Contract

Issued by Chicago, Burlington & Quincy Railway Company.

Agents of this company are not authorized to agree to forward Live Stock to be delivered at any specified time or for any particular market.

Agents will permit only the names of the owners or *bona fide* employés, who accompany the stock, to be entered on the back of the contract without regard to passes allowed by number of cars.

2 The Contract when endorsed by the person or persons in charge and signed in ink by agent, will entitle such person or persons to ride on same train with stock to care for same, but will not entitle holder of contract to ride on any other train, nor will contract be accepted for passage on any passenger train.

Conductor of freight train must punch contract, or in absence of punch will endorse his name on back of Contract when presented for passage.

Live Stock Contracts are not good for return passage. Parties entitled to return passage will be provided with return ticket on application to proper office. Conductors will be held strictly responsible for permitting persons to ride on stock contracts, except when in charge of Live Stock.

No. of waybill.	No. and initial of car.	No. of animals in each car.
42	50043Q	17
43	16168Q	17

Read the Contract.

ROBERTSON, MO., STATION.

This Contract, made and entered into this 26 day of Sep., 1903, by and between Ed Williams of Robertson, of the first part, and the Chicago, Burlington & Quincy Railway Company of the second part.

Witnesseth, That for and in consideration of 23½ per cwt., subject to minimum weights as shown in published tariffs, the said Railway Company agrees to transport 2 cars loaded with cattle (number of cars, number of waybill, and number of animals as noted above), from Robertson to U. S. yds. consigned to Drumm Com. Co.; and the said first party in consideration thereof, agrees to deliver the said animals, to the said Railway Company, for transportation between the points aforesaid upon the following terms, viz.:

That, whereas, the said first party, before delivering the said animals to said Railway Company, demanded to be advised of the rate to be charged for the carriage of said animals, as aforesaid, and thereupon was offered by the said Railway Company alternative rates proportionate to the value of the said animals, such value to be fixed and declared by the first party or his agent, and

3 Whereas, such alternative rates are made in pursuance of the provisions relating thereto of the classification of freights adopted as regulations by the said Railway Company, and fully set forth as follows, to-wit:

'Live Stock.—Ratings given above are based upon declared valuations by shippers, not exceeding the following:

Each Horse or Pony (Gelding, Mare or Stallion), Mule or Jack	$100.00
Each Ox, Bull or Steer	50.00
Each Cow	30.00
Each Calf	10.00
Each Hog	10.00
Each Sheep or Goat	3.00

'When the declared value exceeds the above, an addition of 25 per cent. will be made to the rate for each 100 per cent. or fraction thereof, of 'additional declared valuation per head;' which said alternative rates are fully shown in and upon the regular tariffs and classifications printed, published and posted by the said Company as required by law, and

Whereas, the first party, in order to avail himself of said alternative rates, and to secure the benefit thereof, has declared, and does hereby declare said animals to be of the value as follows, to-wit: Each Steer, Value, $50.00.

To which value the rate aforesaid is proportioned by the classifications and tariffs aforesaid.

Now, in consideration of the premises and of the foregoing, it is expressly agreed that for all purposes connected with, resulting from, or in any manner growing out of this contract, and the transportation of the said animals pursuant thereto, the value of the said animals and of each thereof, shall in no case exceed the said valuation.

It is further agreed in consideration of the alternative rate so made by the said Railway Company and accepted by the first party, that in case of loss or of damage to said animals, whether resulting from accident or negligence of said Railway Company, or its servants, the said Railway Company shall not be liable in excess of the actual loss or damage; and in no case shall the said Railway Company be liable in any manner in excess of the agreed valuation upon each animal lost or damaged. Nor shall said Railway Company be liable for loss or damage after delivery to any connecting line, nor for any loss or damage not incurred upon its own line, but nevertheless in the event that the said animals are to be transported beyond the line of the railway of the second party upon and by any connecting line forming a part of the system known as the 'Burlington System' then it is expressly understood and agreed that this contract shall be for and shall inure to the benefit of, the corporation operating such connecting line, and such connecting line shall be liable to perform all the obligations of this contract.

It is further agreed that the said Railway Company shall in no case be liable for any loss or damage to said animals, unless a claim shall be made in writing by the owner or owners thereof, or his or their agents, and delivered to a General Freight Agent of the said Railway Company, or to the agent of said Railway Company at the station from which the animals are shipped, or to the agent at the point of destination, within ten (10) days from the time the said animals are removed from the cars. And in case of loss or damage upon any connecting line, such connecting line shall not be in any manner liable unless claim shall be made in like manner in writing to such general officer or agent of such connecting line.

And in consideration of free transportation for one person, designated by the first party, hereby given by said Railway Company, such persons to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said Railway Company shall not be responsible for such attention and care; and, further, that the second party shall not be liable to the first party, or any of his servants, agents, or co-partners, or other person, carried pursuant to this contract, for any injury or damage, from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard.

It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge; that the second

party shall not be liable for loss from theft, heat or cold, jumping from car, or other escape, injury in loading or unloading, injury which animals may cause to themselves or to each other, or which result from the nature or propensities of such animals, and that the Railway Company does not agree to deliver the stock at destination at any specified time, nor for any particular market.

Witness the name of the Railway Company by its Agent, and the hand of the first party, the day and year first above written.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,
By C. M. HOLT, *Agent.*

ED WILLIAMS, *Shipper.*

If this contract is for two or more cars, and is presented to the Company's Agents at the below named addresses within 3 days from date, it may be exchanged for a return pass for the above named party in charge, it being distinctly understood that said pass must be used the same day as issued.

Atchison, Kans., General Agent's Office.
Beardstown, Ills., Local Freight Agent's Office.
Burlington, Iowa, Division Freight Agent's Office.
Chicago, Ills., General Freight Office, Union Stock Yards."

6 The defendant pleaded that it was exempt from liability for damages to the plaintiff by virtue of the italicized paragraph of the foregoing agreement. At the close of the trial there was substantial evidence that the injury to the plaintiff was caused by the negligence of the defendant's servants in the operation of the cattle train, the evidence relative to the contract between the parties for the free transportation of the plaintiff was uncontradicted and it established these facts: The plaintiff resided at Robertson in the State of Missouri. He had been engaged in dealing in and shipping cattle in that state for eighteen years, had frequently made contracts of the character of that here in evidence and was familiar with this agreement, and with the rates and terms upon which the railway company transported cattle from Robertson to the city of Chicago. The defendant operated regular passenger trains and carried passengers thereon between these stations for a regular fare of about $12. The danger of accident and injury to one riding in the caboose of a cattle train is about four times the danger to one riding in a coach of a passenger train. The defendant offered to carry and did transport cattle from Robertson to Chicago and between other places on its railroad and assumed the entire responsibility and care of them during the transportation, without furnishing free transportation to the shipper or any of his agents and without any agreement that he or any of his agents should water, feed, or give care or attention to the cattle during the transportation, for the same price and rate as it charged and received in cases in which the owner or his agent received free transportation upon the cattle train and agreed to assume the responsibility of the care of the cattle and the risk of his own injury while riding upon the freight train, as he did in the con-

tract in evidence. The railway company preferred to carry and care for the cattle without furnishing transportation to anyone
7 upon the freight trains, but nevertheless it offered to provide, and when desired did provide free transportation on the cattle train for one person for every two cars shipped upon the terms specified in the italicized paragraph of the agreement. Cattle were shipped each way. The railway company charged and received the same rate which ever method was adopted and left the shippers free to make their choice. The majority of the shippers accepted the free transportation on the train with their cattle and agreed to care for them and to hold the company exempt from liability for any injury to themselves while they were riding on the freight train. The plaintiff and other shippers had the option to ship their cattle without free transportation for any one and to throw the entire care of the cattle on the company, or to accept the free transportation and to make the agreement to care for their cattle during the transportation and to exempt the defendant from liability for their injuries while riding upon the cattle train. The plaintiff was not requested, required or constrained to accept the free transportation upon the cattle train upon which he rode, to assume the care of the cattle during their carriage or to ride on the cattle train and to agree that the defendant should not be liable for his injuries while he was so carried, but he did so voluntarily because he wished to accompany his cattle to Chicago and to sell them there. In this state of the case the trial court denied the request of counsel for the defendant to instruct the jury to return a verdict in its favor, an exception was taken to this ruling and it was assigned as error.

8 And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following question of law is presented by the assignment of errors in this case, that its decision is indispensable to a determination of this case and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following question:

Where the owner of cattle has the option to ship them to market at the same rate without free transportation for himself or his agents on the cattle train, to throw the entire responsibility of the care of the cattle during the transportation upon the railroad company and to travel to the market town on a passenger train of that company for the regular fare, or to accept free transportation to the market town upon the cattle train which carries his cattle, to assume the responsibility of their care during the transportation and to agree that the railroad company shall not be liable to him for any injury or damage which he sustains while he is being so carried, and without request, requirement or constraint he voluntarily chooses the latter alternative, is his contract that the railroad company shall not be liable to him for such injury or damage valid?

WALTER H. SANBORN,
WILLIAM C. HOOK,
ELMER B. ADAMS,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

9 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of Chicago, Burlington & Quincy Railway Company, Plaintiff in Error, *vs.* Edgar C. Williams, No. 2303, December Term, 1905, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, this twenty-second day of March, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

10 [Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1905. No. 2303. Chicago, Burlington and Quincy Railway Company, Plaintiff in Error, *vs.* Edgar C. Williams Certificate of a Question to the Supreme Court of the United States. Filed Mar. 22, 1906. John D. Jordan, Clerk.

Endorsed on cover: File No. 20,162. U. S circuit court appeals, 8th circuit. Term No. 243. Chicago, Burlington & Quincy Railway Company, *vs.* Edgar C. Williams. (Certificate.) Filed March 31st, 1906. File No. 20,162.

FILE COPY.

FILED.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 243.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY

vs.

EDGAR C. WILLIAMS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT AND BRIEF ON BEHALF OF CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

O. H. DEAN,
W. D. MCLEOD,
HALE HOLDEN,
H. C. TIMMONDS,
Attorneys for the Railway Company.

O. M. SPENCER,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 25699

(20,162.)

(20,162.)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 243.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY

vs.

EDGAR C. WILLIAMS.

Statement of the Case.

This case is in this court upon a certificate filed herein on March 31, 1906, by order of the United States Circuit Court of Appeals for the Eighth Circuit, which certificate (omitting caption and formal parts) is in words and figures as follows:

"The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the city of St. Louis, Missouri, on the 22d day of March, A. D. 1906, certifies that the record on file in the action above entitled, which is pending in this court upon a writ of error duly issued to review a judgment rendered in this action in favor of the defendant in error, in the United States Circuit Court for the Western District of Missouri, discloses the following facts:

"The judgment which the writ of error challenges was rendered after a trial and a verdict of a jury for $5,000 damages caused to the defendant in error, who will hereafter be called

the plaintiff, by the negligence of the servants of the railway company, the defendant below, in the operation of a cattle train, in the caboose of which the plaintiff was riding under this contract.

"BURLINGTON ROUTE.

" Live Stock Contract.

"Issued by the Chicago, Burlington & Quincy Railway Company.

"Agents of this company are not authorized to agree to forward live stock to be delivered at any specified time or for any particular market.

"Agents will permit only the names of the owners or *bona fide* employees, who accompany the stock, to be entered on the back of the contract without regard to passes allowed by number of cars.

"The contract when endorsed by the person or persons in charge and signed in ink by agent, will entitle such person or persons to ride on same train with stock to care for same, but will not entitle holder of contract to ride on any other train, nor will contract be accepted for passage on any passenger train.

"Conductor of freight train must punch contract, or in absence of punch will endorse his name on back of contract when presented for passage.

"Live stock contracts are not good for return passage. Parties entitled to return passage will be provided with return ticket on application to proper office. Conductors will be held strictly responsible for permitting persons to ride on stock contracts, except when in charge of live stock.

" No. of waybill.	No. and initial of car.	No. of animals in each car.
42	50043Q	17
43	16168Q	17

"READ THE CONTRACT.

"ROBERTSON, MO., STATION.

"This contract, made and entered into this 26 day of Sept., 1903, by and between Ed Williams of Robertson, of the first

part, and the Chicago, Burlingtin & Quincy Railway Company of the second part,

"Witnesseth, that for and in consideration of 23½ per cwt., subject to minimum weights as shown in published tariffs, the said railway company agrees to transport 2 cars loaded with cattle (number of cars, number of waybill, and number of animals as noted above), from Robertson to U. S. yards, consigned to Drumm Com. Co., and the said first party in consideration thereof agrees to deliver the said animals to the said railway company for transportation between the points aforesaid upon the following terms, viz:

"That, whereas, the said first party, before delivering the said animals to said railway company, demanded to be advised of the rate to be charged for the carriage of said animals, as aforesaid, and thereupon was offered by the said railway company alternative rates proportionate to the value of the said animals, such value to be fixed and declared by the first party or his agent; and

"Whereas, such alternative rates are made in pursuance of the provisions relating thereto of the classification of freights adopted as regulations by the said railway company, and fully set forth as follows, to-wit:

"*Live Stock.*—Ratings given above are based upon declared valuations by shippers, not exceeding the following:

"Each horse or pony (gelding, mare or stallion), mule or jack	$100.00
"Each ox, bull or steer	50.00
"Each cow	30.00
"Each calf	10.00
"Each hog	10.00
"Each sheep or goat	3.00

"When the declared value exceeds the above an addition of 25 per cent. will be made to the rate for each 100 per cent. or fraction thereof, of 'additional declared valuation per head;' which said alternative rates are fully shown in and upon the regular tariffs and classifications printed, published and posted by the said company as required by law; and

"Whereas, the first party, in order to avail himself of said alternative rates, and to secure the benefit thereof, has declared, and does hereby declare, said animals to be of the value as follows, to-wit:

"Each steer, value, $50.00.

"To which value the rate aforesaid is proportioned by the classifications and tariffs aforesaid.

"Now, in consideration of the premises and of the foregoing, it is expressly agreed that for all purposes connected with, resulting from, or in any manner growing out of this contract, and the transportation of the said animals pursuant thereto, the value of the said animals and of each thereof, shall in no case exceed the said valuation.

"It is further agreed in consideration of the alternative rate so made by the said railway company and accepted by the first party, that in case of loss or of damage to said animals, whether resulting from accident or negligence of said railway company, or its servants, the said railway company shall not be liable in excess of the actual loss or damage; and in no case shall the said railway company be liable in any manner in excess of the agreed valuation upon each animal lost or damaged. Nor shall said railway company be liable for loss or damage after delivery to any connecting line, nor for any loss or damage not incurred upon its own line, but nevertheless in the event that the said animals are to be transported beyond the line of the railway of the second party upon and by any connecting line forming a part of the system known as the 'Burlington system' then it is expressly understood and agreed that this contract shall be for and shall inure to the benefit of the corporation operating such connecting line, and such connecting line shall be liable to perform all the obligations of this contract.

"It is further agreed that the said railway company shall in no case be liable for any loss or damage to said animals, unless a claim shall be made in writing, by the owner or owners thereof, or his or their agents, and delivered to a general freight agent of the said railway company, or to the agent of said railway company at the station from which the animals are shipped, or to the agent at the point of destination, within ten (10) days from the time the said animals are removed from the cars. And in case of loss or damage upon any connecting line, such connecting line shall not be in any manner liable unless claim shall be made in like manner in writing to such general officer or agent of such connecting line.

"*And in consideration of free transportation for one person, designated by the first party, hereby given by said railway company, such persons to accompany the stock, it is*

agreed that the said cars, and the said animals contained therein are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said railway company shall not be responsible for such attention and care; and further, that the second party shall not be liable to the first party, or any of his servants, agents, or copartners, or other person, carried pursuant to this contract, for any injury or damage, from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard.

"*It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge;* that the second party shall not be liable for loss from theft, heat or cold, jumping from car, or other escape, injury in loading or unloading, injury which animals may cause to themselves or to each other, or which result from the nature or propensities of such animals, and that the railway company does not agree to deliver the stock at destination at any specified time, nor for any particular market.

"Witness the name of the railway company by its agent, and the hand of the first party, the day and year first above written.

"CHICAGO, BURLINGTON & QUINCY
RAILWAY COMPANY,
"By C. M. HOLT, *Agent.*

"ED WILLIAMS, *Shipper.*

"If this contract is for two or more cars, and is presented to the company's agents at the below named addresses within 3 days from date, it may be exchanged for a return pass for the above named party in charge, it being distinctly understood that said pass must be used the same day as issued.

"Atchison, Kansas, general agent's office.

"Beardstown, Ills., local freight agent's office.

"Burlington, Iowa, division freight agent's office.

"Chicago, Ills., general freight office, Union Stock Yards."

The defendant pleaded that it was exempt from liability for damages to the plaintiff by virtue of the italicized paragraph of the foregoing agreement. At the close of the trial

there was substantial evidence that the injury to the plaintiff was caused by the negligence of the defendant's servants in the operation of the cattle train; the evidence relative to the contract between the parties for the free transportation of the plaintiff was uncontradicted and it established these facts: The plaintiff resided at Robertson in the State of Missouri. He had been engaged in dealing in and shipping cattle in that State for eighteen years, had frequently made contracts of the character of that here in evidence and was familiar with this agreement, and with the rates and terms upon which the railway company transported cattle from Robertson to the city of Chicago. The defendant operated regular passenger trains and carried passengers thereon between these stations for a regular fare of about $12. The danger of accident and injury to one riding in the caboose of a cattle train is about four times the danger to one riding in a coach of a passenger train. The defendant offered to carry and did transport cattle from Robertson to Chicago and bteween other places on its railroad and assumed the entire responsibility and care of them during the transportation, without furnishing free transportation to the shipper or any of his agents, and without any agreement that he or any of his agents should water, feed, or give care or attention to the cattle during the transportation, for the same price and rate as it charged and received in cases in which the owner or his agent received free transportation upon the cattle train and agreed to assume the responsibility of the care of the cattle and the risk of his own injury while riding upon the freight train, as he did in the contract in evidence. The railway company preferred to carry and care for the cattle without furnishing transportation to any one upon the freight trains, but nevertheless it offered to provide, and when desired did provide free transportation on the cattle train for one person for every two cars shipped upon the terms specified in the italicized paragraph of the agreement. Cattle were shipped each way. The railway company charged and received the

same rate, whichever method was adopted, and left the shippers free to make their choice. The majority of the shippers accepted the free transportation on the train with their cattle and agreed to care for them and to hold the company exempt from liability for any injury to themselves while they were riding on the freight train. The plaintiff and other shippers had the option to ship their cattle without free transportation for any one and to throw the entire care of the cattle on the company, or to accept the free transportation and to make the agreement to care for their cattle during the transportation and to exempt the defendant from liability for their injuries while riding upon the cattle train. The plaintiff was not requested, required, or constrained to accept the free transportation upon the cattle train upon which he rode, to assume the care of the cattle during their carriage, or to ride on the cattle train and to agree that the defendant should not be liable for his injuries while he was so carried, but he did so voluntarily, because he wished to accompany his cattle to Chicago and to sell them there. In this state of the case the trial court denied the request of counsel for the defendant to instruct the jury to return a verdict in its favor; an exception was taken to this ruling and is was assigned as error.

And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following question of law is presented by the assignment of errors in this case, that its decision is indispensable to a determination of this case, and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following

QUESTION.

"Where the owner of cattle has the option to ship them to market at the same rate without free transportation for himself or his agents on the cattle train, to throw the entire responsibility of the care of the cattle during the transportation upon the railroad company and to travel to the market on a

passenger train of that company for the regular fare, or to accept free transportation to the market town upon the cattle train which carries his cattle, to assume the responsibility of their care during the transportation, and to agree that the railroad company shall not be liable to him for any injury or damage which he sustains while he is being so carried, and without request, requirement, or constraint he voluntarily chooses the latter alternative, is his contract that the railroad company shall not be liable to him for such injury or damage valid?"

The prominent feature apparent in the facts of this case, as set forth in the foregoing certificate, is this: Williams, the shipper, had the option to ship his cattle without free transportation for himself, and to throw the entire care of the cattle on the company, or to accept free transportation for himself and care for the cattle during the transportation and exempt the carrier from liability for his injury while riding upon the cattle train. He was not requested, required, or constrained to accept the free transportation upon the cattle train, to assume the care of the cattle during their carriage, or to ride on the cattle train and agree that the company should not be liable for his injuries while he was so carried; but he did so voluntarily.

He had a real freedom of choice and a practicable alternative. He was under no compulsion nor was he in a position of inequality with the carrier.

Specification of Error.

The Chicago, Burlington and Quincy Railway Company alleges that the Circuit Court of the United States for the Western Division of the Western District of Missouri committed error in the following particular, viz: That said court erred in denying the request of counsel for the defendant to instruct the jury to return a verdict in its favor; to which action of the court exception was duly taken, and the same was duly assigned as error in the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF.

I.

Under the provisions of the live stock contract, the plaintiff was not a passenger for hire, and his release to the defendant of all claims for personal injuries is valid.

The clause of the contract relied on is as follows:

"And in consideration of free transportation for one person, designated by the first party, hereby given by said railway company, such persons to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said railway company shall not be responsible for such attention and care; and, further, that the second party shall not be liable to the first party, or any of his servants, agents or copartners, or other person carried pursuant to this contract, for any injury or damage from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard."

There was at that time, and still is, a statute of Missouri, relating to the transportation of shippers of stock, in the following language:

"SEC. 1085. *Shall Transport Shippers of Stock or Melons.*—Whenever any railroad company or corporation doing business within the limits of this State shall receive and ship any live stock, or watermelons, when shipped with the privilege of peddling along the line of said road or roads, by the carload, said company shall, in consideration of the price paid for such car, pass the shipper or his employee to and from said point designated in contract or bill of lading without further expense to shippers, under penalties as in the two

preceding sections: *Provided,* That this section shall not be so construed as to permit a shipper of live stock to peddle the same along the line of said road or roads."

This statute can have no application in this case for the following reasons:

1. The statute is unconstitutional and void, because it violates the provisions of the fourteenth amendment to the Constitution of the United States.

Atchison, Topeka & S. F. Ry. Co. vs. Campbell, 61 Kan., 439.

Lake Shore Ry. Co. vs. Smith, 173 U. S., 684.

2. The statute, if valid, cannot apply to the shipment in this case, because it was an interstate shipment.

State of Kansas vs. Otis, 60 Kan., 248.

Railroad Co. vs. Husen, 95 U. S., 465.

This section of the statutes of Missouri, being therefore no part of this contract, and there being no Federal statute bearing upon the question, the free transportation upon this freight train, provided by the contract, was not a service which Williams "had a *right to demand* and which the railroad company was under *a legal duty to furnish.*"

Baltimore & Ohio Ry. Co. vs. Voight, 176 U. S., *loc. cit.,* 513.

II.

The contract in question, whereby the shipper, in consideration of the free transportation given him by the carrier, agreed that the carrier should not be liable to him for any injury suffered while being so transported, is valid and binding on him.

In making this assertion we are mindful that (as stated in *Northern Pacific Railway Company vs. Adams*, 192 U. S., *loc. cit.*, 451) "this question has received the consideration of many courts and has been answered in different and opposing ways."

In the following cases, among others, the question has been passed upon and the validity of contracts of release, similar in language or legal effect, sustained:

Boering vs. Cheaspeake Beach Ry. Co., 193 U. S., 442.

Northern Pacific Railway Co. vs. Adams, 192 U. S., 440.

Baltimore & Ohio Ry. Co. vs. Voight, 176 U. S., 498.

Hartford Fire Insurance Co. vs. C., M. & St. P. Ry. Co., 70 Fed., 201.

McDermon vs. So. Pac. R. Co., 122 Fed., 669.

Bates vs. Old Colony R. R. Co., 147 Mass., 255; 17 N. E., 633.

Hosmer vs. Same, 156 Mass., 506; 31 N. E., 652.

Robertson vs. Same, 156 Mass., 526; 31 N. E., 650.

L. N. A. & C. Ry. Co. vs. Keefer, 146 Ind., 21; 44 N. E., 797.

P. C., etc., Ry. Co. vs. Mahoney, 148 Ind., 196; 46 N. E., 917.

Quimby vs. B. & M. R. Co., 150 Mass., 365; 23 N. E., 205.

Muldoon vs. Seattle Ry. Co., 7 Wash., 528; 38 Am. St. Rep., 901.

Payne vs. T. H. & I. R. Co., 157 Ind., 616; 62 N. E., 473.

Griswold vs. N. Y., etc., R. Co., 53 Conn., 371; 55 Am. Rep., 115.

Rogers vs. Kennebec Steamboat Co., 86 Me., 261; 29 Atl., 1069.

Kinney vs. Central R. Co., 34 N. J. L., 513; 3 Am. St. Rep., 265.

Wilson vs. Atlantic Coast Line R. Co., 129 Fed., 774.

Long vs. Lehigh Valley R. Co., 130 Fed., 870.

A.

In *Hartford Ins. Co. vs. C. M. & St. P. Ry. Co.*, 70 Fed, 202, the Circuit Court of Appeals for the Eighth Circuit said:

"The public policy of a State or nation must be determined by its constitution, laws and judicial decisions, not by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public."

In earlier days the rule was announced that a common carrier could not, by any means whatever, avoid the liabilities imposed upon it by the common law.

At an early date as well, it was seen that this rule was unnecessarily rigid and it is now universally conceded that a carrier *for hire* may, by special contract, limit its liability for a reasonable and just exemption from responsibility for injuries.

This rule applies to carriers of passengers for hire—to carriers exercising the functions *imposed by law* and the performance of which the passenger has a *legal right* to demand.

From negligence, whereby a passenger *for hire* may be injured, the general rule is that the carrier may not stipulate for exemption. Such is the rule in the Federal courts and it

is founded upon reasons of public policy, arising out of the public nature of the employment. Stated differently the rule may be said to exist because, when the carrier is paid his charge, or receives the consideration he is authorized by law to exact, the passenger obtains a *legal right* to demand the transportation and likewise the carrier becomes legally bound, in the performance of the public duty thus confided to him, to render the service and in rendering it, the law, for reasons of public interest and welfare, will not permit him to stipulate against his own negligence. The passenger in such a relationship is not a free agent—he requires the transportation and has a right to demand it; under such circumstances the law will not permit the carrier to trade or bargain upon the performance of this public and compulsory duty. It requires him to perform it upon demand and payment of toll, and justly exacts the highest degree of human care in the performance of it.

B.

There are services rendered by carriers, however, outside of and in addition to those above enumerated—services which the carrier is *not* under legal duty to render, and which the traveler or shipper has *no legal right to demand.* Such services are usually evidenced by special contracts announcing upon their face the voluntary character of the relationship, and which are upheld by the courts where it clearly appears that the traveler or shipper was under no duress of circumstance and had a free choice in fact of two courses:

(1) to demand by proper payment the full performance of the common law or statutory duty of the carrier, or

(2) to waive that duty and enter into a special contract upon different and limited conditions as to the duty to be performed as well as to the consideration to be rendered by him to the carrier.

Thus a limited liability for loss of property in consideration of a reduced rate of freight is upheld.

Arthur vs. Texas & Pacific Ry. Co., 139 Fed., 127.
Cau vs. Same, 194 U. S., 427.

That a common carrier may, with the assent of the shipper fairly obtained, restrict its common-law liability, is well recognized in Missouri.

Ficklin vs. Railroad, 117 Mo. App., 221.

This rule is also recognized and enforced by the United States Circuit Court of Appeals, Eighth Circuit.

M. K. & T. Ry. Co. vs. Patrick, 144 Fed. Rep., 632.

So also the carrier and shipper may, by special contract, place upon the shipper the duty to unload, feed and water stock in transit, and to that extent relieve the carrier from this duty.

Lawson on Carriers, Sec. 175.
Hutchinson on Carriers, Sec. 322.
Duvenick vs. Ry. Co., 57 Mo. App., 550.

It is a well recognized principle of law that a common carrier of cattle can contract with the shipper that either he or his agent shall accompany the cattle upon a free pass furnished by the carrier and look after them and that as to all the things to be attended to or performed by such shipper or his agent, the responsibility of the carrier ceases.

Thus in *Terre Haute and Logansport Ry. Co. vs. Sherwood*, 132 Indiana, 129, the contract between the carrier and shipper was that the former should furnish "free passage for one person intrusted by said party of the second part with the conrtol of said animals while in transit; and it is expressly agreed, that the said company shall not be liable for any damages which may occur while said animals are being loaded or unloaded, or which may result from their being

wild, vicious, unruly, or weak, or their escaping or dying, or from their injuring or killing themselves or each other."

In this case the court said:

"This case is, it is evident, not the ordinary one where the carrier has exclusive custody of inanimate property. Here we have a special contract made by the shipper and the carrier for the transportation of live stock at reduced rates of freight, and wherein it is provided that the latter shall be absolved from liability for designated perils, and that the former 'shall send with said stock one or more men, as may be necessary, to care for said stock while in transit, to load, unload, feed and water said animals at their own risk and expense.' The agreement of the owners to take charge of the animals exerts an important influence upon the case. The effect of this agreement is to place the animals in their immediate custody during transportation. Their agent is to care for them, and is to do all things expressly specified. * * * They agree that they will care for the animals, feed and water them, load and unload them, and they also agree that this shall be done at their own risk and expense. It seems clear, upon principle, that the owners are bound to aver and prove that the loss was not attributable to a failure to perform their part of the contract, or to negligence in performing the acts which they expressly undertook to perform. As to important things, they were the actors, and they were in a position to know what was done or left undone, and they cannot recover of the carrier without showing that the loss was not attributable to a breach of duty or violation of contract on their part, for they assumed duties as explicitly and fully as did the carrier."

In *Grieves vs. Illinois Central Railroad Co.*, 104 Iowa, 659, the court said:

"But the company had the right to employ the plaintiff by furnishing him transportation to accompany the stock, load and unload, water, and feed it, and if he actually undertook to do this, and injury was occasioned by his negligence, it is not perceived on what theory the carrier may be held responsible. In such a case damages result, not from any lack of care on the part of the carrier, but from that of the owner. (See *Hart vs. Railroad Co.*, 69 Iowa, 485, 29 N. W.,

597; *McCoy vs. Railroad Co.*, 44 Iowa, 424.) Now, if the owner undertakes to oversee the transportation of his stock and to attend to loading and unloading it, feeding and watering it, whether by contract or voluntarily, and it suffers injury through his fault, he cannot recover, though the contract in no way relieves the company from liability. Hence the section of the statute is not applicable in such a case. From his familiarity with the animals he is presumed to know what care is required better than a stranger, and, having undertaken to bestow this, the company is not liable for his omission to do so, unless resulting from its failure to furnish proper facilities therefor or reasonable opportunity for so doing. In other words, the carrier is liable for such losses only as result from its failure to discharge duties not assumed and undertaken by the shipper. *Railway Co. vs. McRae* (Tex. Sup.), 27 Am. St. Rep., 926, and note (S. C., 18 S. W., 672); *Johnson vs. Railway Co.* (Miss.), 11 So. Rep., 104; *Clarke vs. Railroad Co.*, 67 Am. Dec., 205, and note; 5 Am. & Eng. Enc. Law (2d ed.), 440."

It cannot be reasonably urged that the shipper is a passenger, who accompanies his cattle, horses, hogs or sheep, and lawfully contracts to superintend to the loading and unloading of them and to the feeding and watering of them and whose duty it is to get his stock up when they fall down and to protect his entire shipment from those that may be vicious and protect them from suffocation or overheating and who in the discharge of these obligations must sometimes be on top of the freight cars and at other times inside with his cattle. He may ride in the caboose attached to the freight train a part of the time or even most of the time and a part of the time he will be working in and about the train. Will it be said that while riding in the caboose he is a passenger, but when he is working in or about the freight cars he is not?

It cannot be said, in view of the authorities upon this subject, that the contract is invalid so far as the stipulation of the shipper to look after his cattle is concerned; provided his agreement has been entered into without constraint or compulsion and freely upon his part; how then can it be claimed

that the shipper is a passenger when the obligation he has assumed and the duties he is required to perform take away from him all the characteristics of a passenger?

C.

Upon the same principle, liability for injuries to the traveler, whether from negligence of the carrier or otherwise, may be waived by special contract, where the traveler, having a free choice, elects not to demand the performance by the carrier of his common-law duty, but is content in consideration of free or voluntary transportation to release the carrier from such liability.

Mr. Justice Shiras, in *B. & O. Ry. Co. vs. Voight, supra,* said:

"At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."

Such special contracts do not violate any consideration of public policy. They are private contracts, containing no element of public or compulsory duty or public right, and in such the public has no interest.

In *Hartford Ins. Co. vs. C. M. & St. P. Ry. Co., supra,* it was held, in considering a question of this character:

"Whether or not such a provision of a contract is against public policy is a question of general law and not dependent solely upon any local statute or usage. Over this question the national courts exercise concurrent jurisdiction with those of the State and while the decisions of the latter are always entitled to the weight of persuasive authority, the Federal courts must in the end exercise their own judgment."

In *Northern Pacific Ry. Co. vs. Adams,* 192 U. S., 440, the deceased traveler, Adams, was riding upon a free pass containing a release from liability for injuries from negligence of the company or otherwise.

The Supreme Court stated the question for decision in these words:

"Is the company responsible for injuries resulting from ordinary negligence to an individual whom it permits to ride without charge on condition that he take all the risks of such negligence?"

And answered the question thus:

"In the light of this decision (*Baltimore & Ohio, etc., Railway vs. Voight,* 176 U. S., 468) but one answer can be made to the question. The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. *He was not in the power of the company and obliged to accept its terms. They stood on an equal footing.* If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, *it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby.*"

The *Adams case,* from which the foregoing quotation was taken, was cited by this court in *Boering vs. Chesapeake Beach Ry. Co.,* 193 U. S., 442, 449, as settling and determining the question there presented in favor of the carrier. The question was whether a passenger riding on a free pass which contained this stipulation: "The person accepting and using this pass thereby assumes all risk of accident and dam-

age to person and property, whether caused by negligence of the company's agents or otherwise," could recover for injuries received while riding thereon. This court held he could not.

Baltimore & Ohio Ry. Co. vs. Voight, 176 U. S., 498, was a case of an injury to an express messenger employed by the United States Express Company, while riding in an express car; the relationship and rights of the parties were determined by a contract between the railway company and the express company, under which Voight rode free of charge by the railroad company, and by the terms of his contract of employment by the express company he assumed all risk of accident, whether from negligence or otherwise, of any railroad upon which he might be called upon to ride.

The railroad company pleaded this release in bar and in sustaining the plea this court said:

"It is evident that, by these agreements, there was created a very different relation between Voight and the railway company than the usual one between passengers and railroad companies. Here there was *no stress brought to bear on Voight* as a passenger desiring transportation from one point to another on the railroad. His occupation of the car, especially adapted to the use of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of the car. His contract to relieve the company from any liability to him, or to each other, for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble the one in consideration in the Lockwood and similar cases, where the dispensation from liabilities for injuries was made a *condition* of a transportation *which the passenger had a right to demand and which the railroad companies were under a legal duty to furnish.* Doubtless, had Voight only desired the method of transportation afforded the ordinary passenger, he would have been entitled to the rule established for the benefit of such a passenger. *But this he did not desire.* He

was not asking to be carried from Cincinnati to St. Louis, but was occupying the express car as part of his regular employment, and as provided in a contract, which as we have seen, *the railway company was under no legal compulsion to enter into.*

"The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employee than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business—the transportation and delivery of express matter. *His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company.* And, of course, if his position was that of a common employee of both companies he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow servants.

"However, this may be it is manifest that the relation existing between express messengers and transportation companies, under such contracts as existed in the present case, is widely different from that of ordinary passengers, and that to relieve the defendant in error from the obligation of his contract would require us to give a much wider extension of the doctrine of public policy than was justified by the facts and reasoning in the Lockwood case."

And again:

"Without enumerating and appraising all the cases respectively cited, our conclusion is that Voight, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company vs. Lockwood;* that *he was not constrained* to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same *freely and voluntarily,* and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

The Circuit Court of Appeals for the Eighth Circuit, in the case of *Hartford Fire Insurance Co. vs. C., M. & St. P.*

Ry. Co., 70 Fed., 201, had occasion to consider the principle for which contention is now made, namely, the right of a common carrier, when called upon to perform a service not enjoined upon him by law, to divest himself of his character as such and by special contract limit his liability even for his own negligence.

In that case the railroad company had leased a portion of its depot grounds at Monticello, in the State of Iowa, to Simpson, *et al.*, who proposed to and did erect buildings thereon, but one of the conditions of the lease was that the railroad company should be held harmless from all claims for fire, even caused by negligence. A fire did occur with a consequent loss and the insurance company having paid the loss, brought action against the railroad company, claiming to be subrogated to the rights of Simpson for damages. The railroad company pleaded this release in bar, and in passing upon the validity of this plea the court held:

"The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy."

And again:

"The reasons why an unreasonable and unjust contract between a common carrier and another, exempting the former from liability for negligence, is against public policy and void are, that it attempts to release the carrier from the discharge of the essential duties imposed upon it by law, that the parties to the contract are not upon an equal footing, and that it tends to endanger the lives and limbs of passengers and employees. A contract in a lease by a railroad company of a portion of its right-of-way, that it shall not be liable to the lessees for any damages, caused by fire set by the negligence of itself or its employees to the buildings or personal property which the lessees have or place on the leased premises, does not fall within this rule, and is not void, because it does not fall within its reasons. A railroad company does not assume by such a contract to relieve itself of any of its essential duties as a common carrier, or as a *quasi* public corporation. The contract leaves it under the

same duties and liabilities to which it was subject before it was made. It is bound to the same diligence, fidelity and care, after a lease containing such a contract is executed, that it would have been required to exercise if no such agreement had been made. *Express Co. vs. Caldwell,* 21 Wall, 264, 267, 268. The only effect of the contract is to prevent the assumption by the railroad company of a new duty, which it was entirely free to assume or to refuse to assume. It does not tend to endanger the lives of the employees or passengers of the company, and the parties to it stand upon an equal footing when the lease is made, because each is free to make or to refuse to make the contract."

Railroad Company vs. Lockwood, 17 Wallace, 357, is a leading and often cited case. It is in some cases referred to in support of the broad proposition that a stock drover riding upon a "drover's pass" in charge of stock is a passenger for hire.

If this case so decides, it must be frankly conceded that it is decisive of that defense raised in the case at bar. With deference, however, it is earnestly submitted that such an interpretation of that case is altogether erroneous, and it will be the purpose of this brief, as briefly as possible, to show the clear distinction between the *Lockwood case*, as the *facts* show it to have been, and the case at bar, and also to show that under the principles obtaining in the more recent opinions of the Supreme Court, the *Lockwood case* does not apply to the *facts* in the record of the case now under consideration.

In the *Lockwood case* the report contains the following statement of facts bearing upon this question:

"Lockwood, a drover, was injured whilst traveling on a stock train of the New York Central Railroad Company, proceeding from Buffalo to Albany, and brought this suit to recover damages for the injury. He had cattle on the train, and *had been required,* at Buffalo, *to sign an agreement* to attend to the loading, transporting and unloading of them, and to take all risk of injury to them and of personal injury to himself or to whomsoever went with the cattle; and he

received what is called a drover's pass; that is to say, a pass certifying that he had shipped sufficient stock to pass free to Albany; but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. *The agreement stated its consideration* to be the carrying of the plaintiff's cattle at *less than tariff rates.* It was shown on the trial, that these rates were about three times the ordinary rates charged, and *that no drover had cattle carried on those terms; but that all signed similar agreements to that which was signed by the plaintiff,* and received similar passes."

Thus it appears that the railroad company had but *one method* of carrying cattle—*i. e.,* under a contract which the shipper *was required to sign* in order to secure the transportation of his cattle. That contract compelled the shipper to go with his cattle and take care of them, and, being so compelled, the company also required of him a release from claims for injuries. The company did not attempt to perform its common-law or statutory duty, but carried cattle only upon its own special terms, and hence the shipper dealing with it was not a free agent in dealing with it.

In the case at bar the contract of free carriage of Williams on the cattle train was not based upon, nor did it have anything to do with, the rate charged for transporting the cattle. The contract contained independent and separable clauses, viz: (1) one for the transportation of the cattle; and (2) one for the free transportation of the shipper. The clause relating to the free transportation of the shipper was based upon its own separate and independent consideration, while the transportation of the cattle was based upon another entirely separate and independent consideration.

Mr. Justice Bradley, in stating the question thus raised, first stated his view of the *facts* before him in the record, thus:

"It may be *assumed, in limine,* that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet *his passage* was one of the *mutual terms* of the arrangement *for carrying his cattle.*"

Thus the facts stated by the learned justice are that, before the railroad company would carry *the cattle* (not the shipper), it *required* him to sign this agreement for a release of liability for personal injuries. It distinctly refused to perform its *public duty of a carrier of cattle* until the shipper had entered into this agreement.

As stated in the later case of *Liverpool Steam Co. vs. Phœnix Ins. Co.*, 129 U. S., *loc. cit.*, 441:

"The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle and stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business."

So also in the opinion in the *Lockwood case* (p. 381) Mr. Justice Bradley said:

"And then the inequality of the parties, the *compulsion* under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity."

Thus the turning point of the *Lockwood case* is clearly seen to have been that the shipper, *to secure the transportation of his cattle,* was *required* to sign the agreement. Such was the record before the learned justice who announced the decision, and such has been the construction of the record in that case by the Supreme Court in subsequent cases and by other courts as well.

For instance, in *Liverpool Steam Co. vs. Phœnix Ins. Co., supra,* the Supreme Court (p. 439) spoke of the *Lockwood case* as follows:

"It was an action brought against a railroad corporation by a drover who, while being carried with his cattle on one of its trains under an agreement *which it had required him to sign,* and by which he was to pay certain rates for the

carriage of the cattle, to pass free himself and to take the risks of all injuries," etc.

And in *Quimby vs. Boston & Maine R. R. Co.,* 150 Mass., 365; 23 N. E., 205, the Supreme Court of Massachusetts stated, in referring to the *Lockwood case,* that "it is there held that such a pass is not gratuitous, as it is given as *one of the terms upon which the cattle are carried.*"

The case of *Rogers vs. Kennebec Steamboat Co.,* 86 Me., 261, in considering the Lockwood case, analyzed it in the following words:

"In the great case of *Railroad Co. vs. Lockwood,* 17 Wall., 357, the federal court reached the conclusion that a condition on a 'drover's pass,' requiring the person using it to travel at his own risk, was not a valid and effectual one, and could not exonerate the carrier from liability for negligence. It is important to notice, however, that this decision was put on the ground that a drover's pass was issued as a part of the contract for the carriage of the cattle, and could not be deemed a gratuitous one."

Finally (without unduly multiplying the citation of authorities), in both *Baltimore & Ohio Ry. Co. vs. Voight,* 176 U. S., 498, and *Northern Pacific Ry. Co. vs. Adams,* 192 U. S., 440, the meaning and proper construction of the *Lockwood case* is thus stated (*Voight case, loc. cit.,* p. 520; *Adams case, loc. cit.,* p. 453):

"Without enumerating and appraising all the cases respectively cited, our conclusion is that Voight, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company vs. Lockwood;* that *he was not constrained* to enter into the contract whereby the railroad company was exonerated from liability to him, *but entered into the same freely and voluntarily* and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

D.

"Such a contract" means, therefore, one "freely and voluntarily" entered into, as contrasted with one into which the party is constrained to enter. The former does not contravene public policy—the latter does.

To the former belong those contracts with carriers wherein the shipper or the traveler is under no stress of circumstance nor "in the power of the company and obliged to accept its terms" (*Adams case*, p. 453), and wherein he is enjoying the benefit of a contract which he had no legal right to demand and which the railroad companies were not under a legal duty to furnish.

To the latter belong those contracts with carriers wherein the shipper or traveler is under constraint and is demanding of right the performance of the duty of the common carrier as such and is rendering to it its legal toll for such service.

The distinction thus indicated seems clearly warranted by the better weight of authority and is the rule which distinguishes the cases of *Railway Co. vs. Stevens*, 95 U. S., 655, and *Delaware, L. & W. R. Co. vs. Ashley*, 67 Fed., 209.

In the latter case the court, on page 212, states the facts thus:

"By the contract between the initial company and Jordan, *the car and one man*, in consideration of an agreed-upon freight charge were to be carried to New York. The plaintiff was a passenger for hire, for *his passage was one of the mutual terms of the arrangement for carrying the poultry.*"

In *Payne vs. Terre Haute, etc., Ry. Co., supra*, the Supreme Court of Indiana recognized this distinction in the following language:

"The precise question raised by this appeal has not heretofore been presented to this court, but the principles announced in the Keefer, Mahoney and Russell cases, *supra*, are controlling. In these cases it is expressly declared to be a well established rule that railroad companies, though pub-

lic or common carriers, may contract *as private carriers* for the transportation of persons whom they are not bound as common carriers to receive. In the Keefer and Mahoney cases the court held that railroad companies were not required under the duties they owe to the general public to carry express matter for express companies, that with respect to such transportation they were authorized to contract as private carriers, and that a waiver of liability for negligent injury of express messengers was enforceable. In the Russell case the same doctrine was applied to an action by a porter upon a Pullman sleeping car. These cases prove that private carriers, even for hire, may lawfully attach conditions of exemption for negligence to their contracts for carriage, and *that the test whether a particular contract is that of a public or private carrier is whether the customer, as one of the general public, had the right to compel the carrier to undertake the transportation.* As stated in the Russell case: 'The inquiry remains, is the present contract of exemption invalid, as being within the theory of the rule above explained? If it is it must be by virtue of some positive statute, or because of the fact that it is an abandonment by the carrier of a public duty.' There is no statute that affects the question. If express messengers and Pullman porters, who are on the trains in pursuance of their regular vocations, and whose transportation is paid for cannot require railroad companies to carry them as a public duty, much less can holders of gratuitous passes. They are creatures of favoritism. They voluntarily separate themselves from the general public. They do not approach the companies as part of the general public, to be carried on the usual terms of service and compensation, and they are certainly under no compulsion to enter into the contract of exemption. The reasons on which is based the rule that public carriers will not be permitted to evade a public duty wholly fail, for railroad companies are under no obligation to transport the general public gratuitously."

In *McDermon vs. So. Pac. R. Co., supra*, the relationship of a Pullman porter to the railway company under a contract similar to that in the Voight case came under examination, and in view of the voluntary nature of the undertaking by the plaintiff of his employment, his contract of release was upheld.

The court, after examining numerous authorities, said:

"I am unable to perceive any difference in principle between the porter on a car of the Pullman Company and that of a messenger in an express car. The porter is hired and paid by the Pullman Company. He is subject to its orders, and alone under its control. Such positions are much sought after by such persons as the plaintiff, and in consideration of such favorable position they are more than willing to accept the conditions of their employment imposed upon this plaintiff; and I can perceive no interest of public policy that should prevent him from obtaining such position on his *voluntary acceptance of the conditions* imposed by his employer."

In *Robertson vs. Old Colony R. R. Co.*, 156 Mass., 526, the action was by an employee of a circus company for injuries received while upon defendant's railroad, and it appeared that the circus was being carried under a special contract containing a release from such claims. The Supreme Court of Massachusetts said:

"Unless the defendant was under a common law or statutory obligation to carry the plaintiff *in the manner* he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and the plaintiff cannot recover. The only right which the plaintiff had to be on the train was by virtue of a contract which the defendant had made with the proprietors of a circus whose servant the plaintiff was."

And again:

"This contract the defendant had the right to make, as it was under no obligation to draw the cars as a common carrier."

To the same effect are *Hosmer vs. Old Colony R. R. Co.*, and *Bates vs. Old Colony R. R. Co., supra.*

In *Griswold vs. N. Y. & N. E. R. R. Co.*, 53 Conn., 371, the Supreme Court of Connecticut referred to the *Lockwood case* in this way:

"The Supreme Court of the United States, in *Railroad Company vs. Lockwood,* 17 Wall., 357, where a drover had a free pass to accompany his cattle on their transportation, held, in opposition to the New York and English cases, that the pass was not gratuitous because given as one of the terms for carrying the cattle for which he paid."

And then held:

"In the first place, the arrangement between the parties ought not to be regarded as a contract with the railroad company in its character as a common carrier, and, therefore, the stipulated exemption is no abdication of that rigid responsibility which the law imposes on common carriers. The gratuitous accommodation concerns only the immediate parties, unless in a very indirect way, by making the fare of other passengers higher. If, however, fares are unreasonable, they may be subject to governmental regulation. But it will suffice to say that the remote and indirect effect alluded to cannot make the exemption void on the ground of public policy. Many other gratuities and charities might be named, which though conceded to be commendable, would have a similar effect.

"Again in *Railroad Company vs. Lockwood,* and in other cases advocating the same doctrine, one prominent reason given for holding the contract void, as opposed to public policy, is that in making the contract the carrier and his customer do not stand on a footing of equality; that the latter is only one individual against a powerful corporation, which has him in its power, and that he cannot afford to higgle in regard to terms. It is manifest that this reason has no application at all to a free passenger. If his position is not superior it is at least equal to that of the railroad company. The latter will not often be found urging the acceptance of free passes. There is no possibility of any higgling on the part of the passenger for more favorable terms, and the solicitation for the pass itself will come from the latter also. Under these circumstances it does not seem reasonable to add to a free gift of transportation the burden of insuring the passenger against all personal injuries arising from the negligence of the carrier's servants, the risk being well known and willingly assumed by the passenger as a condition upon which the gift is made."

The courts of England, Ireland, and Canada most decisively hold that a carrier may secure exemption from liability by a stipulation in a drover's pass "assuming all risk." *McCawley vs. Furness Ry. Co.*, L. R., 8 Q. B., 57; *Hall vs. Northeastern Ry. Co.*, L. R., 10 Q. B., 437; *Duff vs. Great Northern R. R. Co.*, Ir. L. R., 4 Com. Law, 178; *Gallin vs. London & N. W. R. Co.*, L. R., 10 Q B., 212; *Alexander vs. Toronto & C. Ry. Co.*, 33 Up. Can. Q. B., 474.

In many cases the same distinction is accepted as established law, and *the test* would seem, therefore, to be:

Was the release given as a condition of a transportation or of a service rendered, which the traveler or shipper had a right to demand and which the railroad company was under a legal duty to furnish?

Or, was the shipper under any constraint, so that he did not freely and voluntarily enter into the contract?

If both of the foregoing questions be answered in the negative, the contract must be upheld.

The authorities hereinabove cited seem to have established the following reasonable rule: If a person voluntarily makes a special contract by which special rights or privileges are secured to himself, in consideration that he shall assume certain risks which the law imposes upon a common carrier, *such contract makes the carrier, as to such person, a special carrier in the performance of that particular contract,* and such contract is not against public policy.

Turning again to *Railroad Co. vs. Lockwood, supra,* Mr. Justice Bradley, after reviewing many authorities, used this language:

"A common carrier may undoubtedly become a private carrier or a bailee for hire, when as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry."

And again:

"If the customer *had any real freedom of choice, if he had a reasonable and practicable alternative,* and if the employ-

ment of the carrier were not a public one, charging him with the duty of accommodating the public in the hire of his employment; then if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept."

And again:

"And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity."

From these quotations, coupled with the recitals of the facts in the report of the *Lockwood case,* as set forth hereinbefore, and in the opening paragraph of Mr. Justice Bradley's opinion, wherein he assumes that Lockwood was a passenger for hire, in that "his passage was one of the mutual terms of the arrangement for carrying his cattle," it would seem conclusively to appear that the learned Justice was dealing with a case wholly different and distinct in its facts from the one at bar.

The *Lockwood case* was one wherein the "customer" was met with a condition which he was "compelled to accept;" a case in which the customer stood in a position of inequality and one in which the customer was under a "compulsion." Lockwood, in order to secure the transportation of his cattle, was *required* to release the company from liability for personal injuries to himself. The alternative was the payment of rates three times the ordinary rates charged, obviously not the "practicable alternative" Mr. Justice Bradley had in mind. Lockwood stood in the position of demanding of the carrier the performance by it of its public

duty as a common carrier. He was not asking consideration at its hands, but demanding of it the performance of its public duty. He was willing to pay the ordinary toll, but the railroad company wrongfully refused to perform its public duty except upon condition.

Lockwood therefore, *having no freedom of choice* and being thus in a *position of inequality,* was not a free agent in executing his release to the company.

E.

Turning again to the certificate of the honorable judges of the Circuit Court of Appeals for the facts in this case, it will be seen that the carrier operated regular passenger trains and carried passengers thereon, on which the shipper might have ridden to Chicago for the regular fare of about $12. He had a right to do that, and it was the duty of the company to so carry him, if he desired. But he was a man of experience in shipping cattle, had frequently made contracts of the character in question, was familiar with the agreement, and with the terms and rates upon which the company transported cattle. The danger of accident and injury to one riding in the caboose of a cattle train is about four times the danger to one riding in a coach on a passenger train. The company offered to transport the cattle and assume the entire responsibility and care of them during transportation, without furnishing free transportation to the shipper, for the same price and rate as it charged in cases where the shipper received free transportation upon the cattle train and assumed the responsibility of the care of the cattle and the risk of his own injury while riding upon the freight train. The company preferred to carry and care for the cattle without furnishing transportation to any one upon the freight trains, but nevertheless it offered to provide, and, when desired, did provide, free transportation on the cattle train upon the terms specified in the italicized paragraph of the agreement.

The company charged the same rate for transporting the cattle, whether the shipper went along under the free transportation or not, and *left the shipper free to make his choice.* The shipper had the option to ship his cattle without the free transportation for himself and to throw the entire care of the cattle upon the company, or to take the free transportation and agree to care for the cattle and exempt the company from liability for his injury while riding upon the cattle train. *He was not requested, required, or constrained* to accept the free transportation, to assume the care of the cattle, or to ride on the cattle train and agree that the company should not be liable for his injuries; *but he did so voluntarily, because he wished to accompany his cattle to Chicago and to sell them there.* He could have paid his fare and gone to Chicago on a regular passenger train; but he preferred to save the fare, wished to accompany the cattle and to ride on the train with them, and, of his own free will and volition, stipulated and agreed with the company as follows:

"And in consideration of free transportation for one person, designated by the first party, hereby given by said railway company, such persons to accompany the stock; it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said railway company shall not be responsible for such attention and care; and, further, that the second party shall not be liable to the first party, or any of his servants, agents or copartners, or other person, carried pursuant to this contract, for any injury or damage, from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard.

"It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge." * * *

Therefore the *particular service* which in this case and under this contract the railroad company was not compelled by law to render, and which Williams had no legal right to demand, was the transportation by the company of himself upon a freight train.

It had a legal right to exclude him from this freight train. He had no legal right to ride upon it. The only right he could obtain to be upon it was secured by this contract.

In *Whitehead vs. Ry. Co.*, 99 Mo., 268, the Supreme Court of Missouri said:

"There can be no doubt but a railroad company, being a carrier of freight and of passengers, may use separate trains for freight and for passengers, and may exclude freight from one and passengers from the other. *Railroad vs. Bartrom*, 2 Ohio St., 459; *Dunn vs. Railroad*, 58 Me., 187.

Further citation of authorities in support of this familiar proposition would not seem to be necessary.

As hereinbefore stated, the contract for transporting the shipper was separable from the contract for transporting the cattle. Each stood upon its own basis; and the stipulation for the free transportation of the shipper and consequent release of the company for injuries to him while riding on the cattle train was of his own free will and volition. *The company owed him no duty to carry him on the cattle train*, much less a duty to so carry him free of charge—especially when it stood ready and willing to carry him on its regular passenger train on payment of the regular fare. The company contracted with him on the terms set out in the agreement, not because it wanted him to enter into such a contract, but because he wanted the company to so contract with him. As stated by the honorable judges of the Circuit Court of Appeals:

"*The company preferred* to carry and care for the cattle without furnishing transportation to any one upon the freight trains, but nevertheless it offered to provide, and, *when desired*, did provide free transportation on the cattle train for

one person for every two cars shipped, upon the terms specified in the italicized paragraph of the agreement."

We respectfully submit that, under the established facts in this case and the legal principles applicable thereto, the contract in question ought to be upheld, and the question propounded by the learned Circuit Court of Appeals for the Eighth Circuit should be answered in the affirmative.

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O. M. Spencer,
Of Counsel.

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JAMES H. McKEN

No. 243.

IN THE

Supreme Court

OF THE

UNITED STATES

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Plaintiff in Error,
vs.
EDGAR C. WILLIAMS,
Defendant in Error.

In error to the Circuit Court of the United States for the Western Division of the Western District of Missouri.

BRIEF OF DEFENDANT IN ERROR.

Imprint: Carson-Harper, Denver

No._____

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BRIEF OF DEFENDANT IN ERROR.

Counsel filing this brief have a similar case, No. 2353, pending in the United States Circuit Court of Appeals for the Eighth Judicial District, which has been postponed by that court until the above entitled case shall be decided in this court. We have obtained the consent of counsel for defendant in error in this cause to submit this

brief in support of the position of the defendant in error and therefore respectfully submit the following in support of the decision of the court below.

We understand the question certified to this court by the Circuit Court of Appeals of the Eighth Judicial District and upon which the opinion of this court is desired, is as follows:

> "Where the owner of cattle has the option to ship them to market at the same rate without free transportation for himself or his agents on the cattle train, to throw the entire responsibility of the care of the cattle during the transportation upon the railroad company and to travel to the market town on a passenger train of that company for the regular fare, or to accept free transportation to the market town upon the cattle train which carries his cattle, to assume the responsibility of their care during the transportation and to agree that the railroad company shall not be liable to him for any injury or damage which he sustains while he is being so carried, and without request, requirement or restraint he voluntarily chooses the latter alternative, is his contract that the railroad company shall not be liable to him for such injury or damage, valid?"

We shall confine ourselves, however, to a discussion of the rights of the shipper or care-taker of cattle traveling on a drover's pass with the cattle, to recover compensation for injuries suffered by him while in charge of such cattle.

ARGUMENT.

We contend that the owner or care-taker of cattle accompanying the same under a limited liability live

stock contract is a passenger for hire if the duty of attending to said stock was placed upon the shipper. We further contend that if the purpose of the person accompanying said stock is to feed, water, load and unload the same, then such person is a passenger for hire and the freight paid for transporting the cattle and his care of them, constitute the consideration for transporting himself as well. If from the evidence it appears that the party injured did accompany said stock for the purposes aforesaid, then he was a passenger for hire, and the railroad company cannot stipulate against liability to him resulting from the negligence of itself or its agents.

The leading case upon this question is that of the New York Central Railroad Company vs. Lockwood, 17 Wallace 357, and able counsel for the railroads have for several years been attempting to secure a reversal of that case; but, as we shall show further on, in vain.

A careful reading of the Lockwood case will show that the contract or release relied on in that case provided that in consideration of the transportation of the cattle "at less than tariff rates," the owner should assume certain risks of injuries to the animals and also

> "That the PERSONS RIDING FREE TO TAKE CHARGE OF THE STOCK do so at their own risk of personal injuries from whatever cause," etc.

Mr. Justice Bradley, who wrote the opinion, which was unanimous, in stating the case says:

> "The plaintiff in this case was a drover, injured whilst traveling on a stock train of the defendants, proceeding from Buffalo to Albany, and the suit was brought to recover damages for the injury. He had cattle in the

train, and had been required at Buffalo to sign an agreement to attend to the loading, transporting and unloading of his cattle, and to take all risk of injury to them and of personal injury to himself, OR WHOEVER WENT WITH THE CATTLE. * * * It may be assumed, *in limine*, that the case was one of carriage for hire, for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question, is, therefore, distinctly raised, whether a railroad company, carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage."

N. Y. C. R. Co. vs. Lockwood, 17 Wallace, 357.

The court held they could not.

We submit that there is at law no essential or material distinction to be drawn between the Lockwood case and the case at bar.

In the Lockwood case, 17 Wall, 357, the court reviews all the authorities, and holds:

1st. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

2nd. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or of his servants.

3rd. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

4th. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

In American Express Co. vs. Ogles, from the Supreme Court of Civil Appeals, Texas, a comparatively late case, 1904, reported in 81 S. W., 1023, it was held that:

> "One accompanying stock as an attendant with the consent of the agent of the express company which was transporting the stock, and of the conductor of the train, was a passenger and entitled to protection as such, although his name did not appear on the written contract as an attendant who was to accompany the stock."

The doctrine of these cases is that a caretaker being necessary, the consideration for carrying such an one is the freight paid or to be paid for the carriage of the stock, and hence when it appears that he is traveling for such purpose, though nominally a free passenger, he is in law a passenger for hire and protected as such. As bearing hereon, see following stock drover cases:

Carroll vs. Mo. P. R. R. Co., 88 Mo., 239.
Ohio & Miss. R. Co. vs. Selby, 47 Ind., 471.
Louisville, etc., R. R. vs. Bell, 38 S. W., 3, from Court of Appeals, Texas.

In Louisville, N. A. & C. Ry. Co. vs. Taylor, from the Supreme Court of Indiana, 25 N. E., 869, it is held:

> "In a contract by a railroad company for the transportation of cattle, a stipulation is void, by which in consideration of a free pass, THE PERSON IN CHARGE OF THE CATTLE releases the company from liability

for any injury sustained by him, and the responsibility for negligence, and the presumption thereof from a collision, ARE THE SAME IN SUCH CASE AS IN CASE OF ANY INJURY TO PASSENGER WHO PAYS FULL FARE."

We call the court's attention to the case of Liverpool Steam Co. vs. Phoenix Ins. Co., 129 U. S., p. 397, to the effect that stipulations relieving the carrier from the exercise of care or diligence are not lawful. Mr. Justice Gray says, at p. 441:

> "The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to haggle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper that the carrier presents, and in most cases he has no alternative but to do this, or to abandon his business.
>
> "Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld, such as those exempting the carrier from responsibility from losses happening from accident, etc., etc. * * * but the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment."

And Justice Gray says:

> "That an analysis of the opinion in Railroad Co. vs. Lockwood shows that it affirms and rests upon the doctrine that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt

from liability for losses caused by the negligence of himself or of his servants, is unreasonable and contrary to public policy, and consequently void."

We are aware that there are decisions of State courts contrary to this doctrine and holding that a common carrier may stipulate for exemption from all liability, even for its own negligence, but Mr. Justice Gray says (at page 443):

> "It is well settled that the courts of the United States are not bound by the decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law, of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State."

In the Philadelphia and Reading R. R. Co. vs. Derby, 14 Howard, U. S., p. 468, it was held:

> "One who, being lawfully on the defendant's railroad, was injured by the gross negligence of one of their own servants, is entitled to an action for his damages, though he was a stockholder of the corporation, was riding by invitation of the president, paying no fare, and not in the usual passenger cars."

Undoubtedly the plaintiff at bar was lawfully on the train, and if he was injured by the negligence of the defendant, then, under the authority of this case, he could recover.

The Cleveland, P. & A. R. Co. vs. Curran, 19 Ohio St., 1, is a State case, and we cite it, adopting the reason-

ing of the case. Curran made a contract with the company, in duplicate, each party taking one. Immediately after the contract the railroad agent produced a blank drover's pass and inquired of Curran whose name should be inserted. Curran gave his name, which was inserted, and Curran proceeded with the stock. The usual stipulation was on the pass, exempting the company for injury even for its own negligence. He was injured, and the court said (page 11):

> "The controversy arising on the record in this case is embraced in two general questions.
>
> "The first we will consider is, whether Curran, the plaintiff below, was, at the time he received the injury complained of, a gratuitous passenger.
>
> "We think he was not. The ticket called a 'drover's pass' entitled him to ride from Cleveland to Erie with his stock, and to return on a passenger train. A single consideration was paid to the company for this privilege and for the transportation of his stock, and the one service can no more be said to have been gratuitous than the other. It is true, the person using the ticket is referred to in the contract as 'riding free;' and in the endorsement on the ticket it is called a 'free ticket;' but these expressions can, in part only, mean that the holder was to be subjected to no additional charge and that he was to pass free of the usual fare exacted of passengers. The writing 'C' on the ticket to be delivered at the same time and together, constitute one contract. The next question is, whether the stipulation in the contract, exempting the company from all liability for negligence, constitutes a defense to the action."

The court holds it to be no defense. We will not quote further from his argument, but we call attention

to the case because of the cogency of the reasoning. He maintains that recovery is allowed for breach of this duty even when no privity of contract exists between the injured passenger and the carrier.

In Delaware, L. & W. R. Co. vs. Ashley, 67 Fed., 209, one J., a shipper of poultry, contracted for a shipment of a carload; the bill of lading and the way bill stipulating that a man in charge should pass free. The company received the car, with the way bill, and passed the plaintiff who was in charge of the poultry, free, but required him to sign a release of any claim for damages.

Plaintiff was NOT THE OWNER OF, NOR INTERESTED IN the poultry. He was injured by the negligence of defendant.

Held that, the transportation of plaintiff having been part of the consideration of the contract, plaintiff was a passenger for hire, and the release was without consideration and invalid.

To the same effect is the decision of the Supreme Court of Michigan; and it seems even where the contract prohibits any names except "bona fide employees" accompanying the stock to be entered on the way bill, any person actually in charge of the stock is a bona fide employee even though there is no agreement to pay him and he was never employed before. Weaver vs. Ann Arbor R. Co., 102 N. W., 1039.

The case of Rowdin vs. Pennsylvania R. Co., 57 Atlantic, pp. 1125-1126, from the Supreme Court of Pennsylvania, a late case (1904), is very similar to the one under consideration. The injured party was there because he was the caretaker of the shipper's horses. He had signed a release on the back of the contract for shipment, in which he assumed all risks of accident, etc., re-

lieving the company. The lower court directed a verdict for defendant. The Supreme Court of Pennsylvania, in reversing the judgment and awarding a *venire de novo*, says (pp. 1126-27):

> "In Pennsylvania R. R. Co. vs. Price, 96 Pa., 256, a passenger is defined to be 'one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as payment of fare, or that which is accepted as an equivalent therefor.' The plaintiff, when injured, was being carried by the defendant company for a consideration under a contract which made him a passenger, and was not 'riding' upon what was equivalent to a free pass, as suggested by the court below."
>
> The learned judge also says:
>
> "He (plaintiff) had paid no fare, and was not, in the ordinary sense of the word, a passenger upon the road of the Pennsylvania R. R. Company. The contract and the release show that the consideration for the transportation of the plaintiff was included in the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract.
>
> "For this consideration the plaintiff was to be carried from ———— to ————. By the terms of the contract the 'shipper is at his own risk and expense to load and take care of, and to feed and water, said stock while being transported.' It therefore became necessary for the shipper to have some person accompany the horses, and this person was required to be on the train carrying his stock. Recognizing the necessity of some person being in charge of the horses and of his having to travel on the same freight train, and desiring to relieve itself from liability for any injuries sustained by him, the defendant company in-

serted in the contract for transportation the stipulation 'that in consideration of the premises, and of the carriage of a person or persons in charge of said stock upon a freight train of said carriers, without charge other than the sum paid or to be paid for the transportation of the live stock,' the shipper would indemnify the carrier against all claims for injuries sustained by the person in charge of the stock. The language of Read, Judge, in Pennsylvania R. R. Co. vs. Henderson, 51 Pa., 315, an action by a person injured while in charge of stock and riding on a 'free ticket,' is pertinent and applicable to the case in hand. He says (note this): 'As it is absolutely necessary in carrying stock, that the persons who have charge of them should be carried by the company, the price paid for the freight includes the cost of transporting the drover, who is not, therefore, a GRATUITOUS, but a paying passenger; and the word FREE is therefore only true so far as that the conductor is not entitled to charge him separately for his passage.' "

"The same principle is announced in Hanover, etc., R. Co. vs. Anthony, 3 Walker's Reports, 210, and it is IMMATERIAL that the consideration for the PLAINTIFF'S TRANSPORTATION is paid by his employer. The rights of a passenger as against the carrier are NOT AFFECTED by reason of the fact that HIS FARE IS PAID BY ANOTHER than the passenger. Marshall vs. The New Castle & Birmingham R. R. Co., 11 C. B., 655. "Aside from the effect of the release upon the contract of carriage of the plaintiff, to be noticed hereafter, he was therefore a passenger while traveling on defendant's road at the time he received his injuries, and was entitled to the rights and protection of a passenger as against the carrier company," etc., etc.

Feldschneider vs. Chicago, M. & St. P. Ry., 99 Northwestern Rep., 1034, is a stock drover's case and precisely in point to the case at bar.

In the Feldschneider case the plaintiff recovered a large judgment and the defendant appealed, and among other things, set up such a contract or similar to the one in our case as a bar to the suit.

Justice Winslow, in deciding the case, says:

> "Another contention is made which requires attention. The contract under which the plaintiff shipped his stock provided that he might accompany his stock upon the train, but that the defendant should in no event be liable for any personal injury to him upon defendant's cars or road in an amount exceeding $500. The trial court charged the jury, in effect, that this clause was ineffective, and not to be considered by the jury, and this ruling is attacked as erroneous. The plaintiff, though nominally traveling without payment of fare, was in fact a passenger for hire, the agreement for his carriage being a part of the mutual agreement for the carriage of his stock for hire. N. Y. Cent. R. R. vs. Lockwood, 17 Wall., 357; Davis vs. C. M. & St. P. Ry. Co., 93 Wis., 470. Being a passenger for hire, a stipulation exempting entirely the company from liability for injuries caused by the negligence of its servants is void, as against public policy. Davis vs. Ry. Co., *supra*. A stipulation limiting the liability of a carrier for loss of personal property shipped to an arbitrary sum, not fixed with reference to the agreed or maximum value of the property, is void. Ulman vs. Ry. Co., 112 Wis., 150. A FORTIORI, a stipulation limiting the liability for injuries to a passenger for hire to an arbi-

trary sum must also be void. The question WOULD NOT SEEM TO BE OPEN TO SERIOUS DISCUSSION."

An early case which strongly supports our view of the law is that of Flinn vs. Phil. Wil. & Balt. R. Co., 1 Houston (Del.), 469. The lower court in its instructions to the jury stated the law as follows:

> "It appears that he was a drover, and that as such was in the through freight train for the purpose of taking care of his stock, which the defendants had received on board for transportation in that train. It also appears that it was the established practice and usage of the company to grant to the owners of live stock, transported over their road, what is termed a drover's ticket, for the purpose of taking care of his stock and upon his releasing the company from any risk on account of it, and paying the rate of freight charged under any circumstances, which ticket authorized such owner to travel or pass in that train without any further fare or compensation than what was included in the freight charged and paid for the stock; and it also appears that the rate of freight charged by the company on live stock was 25 per cent higher when neither the owner nor any one on his behalf passed in the train for the purpose of taking care of the stock. It was under such circumstances, and in accordance with this practice and usage of the company, as is alleged in behalf of the plaintiff, that he was traveling on this occasion, and at the time when the collision happened and the injury complained of was sustained. * * * But the law in its beneficence will not allow any trifling with the lives or personal safety of human beings, and therefore exacts great care,

diligence and skill from those to whose charge as common carriers they are committed; common carriers of passengers are responsible for any negligence resulting in injury to them, and are required in the preparation, conduct and management of their means of conveyance, to exercise every degree of care, diligence, and skill, which a reasonable man would use under such circumstances. This obligation is imposed on them as a public duty, and by their contract, to carry safely, as far as human care and foresight will reasonably admit. A railroad company, using as it does the powerful and dangerous agency of steam, is bound to provide skillful and careful servants, competent in every respect for the posts they are appointed to fill in their service; and is responsible not only for their possession of such care and skill, but also for the continued application of these qualities at all times. PIERCE ON AMERICAN RAILROAD LAW, 469, 470, 471. * * * But we have already informed you, that if you are satisfied, from the evidence in the cause that it was the practice of the company to receive and carry the owners of live stock with their stock on such trains, upon their paying the freight charged under such circumstances, and that the plaintiff had paid his freight and was in the train in conformity with that usage, then he was there rightfully and lawfully, and the defendants and their servants were bound to exercise the same degree of care and diligence in conveying him over their road, in the train in question, as we have before described as incumbent by law on common carriers of passengers for hire generally, and that, so far as this duty was concerned, they stood in a no less responsible relation to him. For in our opinion it was inconsistent with the relation in which they stood to him, or would have stood to any

similar passenger under the like circumstances, and utterly at variance with the duty which the law on the ground of public policy, and as the conservator of the lives and the personal safety, as well as the property of individuals, imposes upon that, as well as upon other classes of common carriers of persons, to allow of such an exemption or limitation of their responsibility for the personal safety of their passengers against injuries resulting from their own negligence, or the want of due care and diligence in carrying them." * * *

And these instructions were affirmed on appeal.

The case of Penn. R. Co. vs. Greso, 79 Ill. App., 129, is another case directly in point.

Greso was in charge of a lot of cattle being shipped by one Albrecht, and both of them signed the following contract:

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract, without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract of which live stock he is in charge, the undersigned does hereby voluntarily assume all risk of accidents or damage to his person or property, and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers, or any of its or their employes, or otherwise.

"Signed, Louis Greso, Karler Albrecht."

In deciding this case the Court of Appeals the second time, 102 Ill. Appeals, 252, the court cited the case of I. C. R. vs. Anderson, 184 Ill., 294, in which the Supreme Court said:

> "So far as the contract exempted the company from liability for any injury to the appellee, except such injury as might be the result of gross carelessness on the part of the company, the contract was void. A person who travels with the consent of a railroad company in a freight train in charge of goods or stock carried by the company for hire, is a PASSENGER, and a railroad company cannot exempt itself from the exercise of care and diligence in conveying its passengers, and can not by contract limit its liability for injuries to passengers for gross negligence alone."

In the case of The Illinois Central Railroad Company vs. Anderson, 184 Illinois, 294; S. C. 56 N. E., 331, the court fully examines the validity of such contracts and holds that they are not valid. In conclusion the court says:

> "So far as the contract exempted the company from liability for any injury to the appellee, except such injury as might be the result of gross carelessness on the part of the company, the contract was void. A person who travels with the consent of a railroad company on a freight train in charge of stock or goods carried by the company for him is a passenger, and a railway company cannot exempt itself from the exercise of care and diligence in conveying its passengers, and cannot, by contract, limit its liability for injuries to passengers to gross negligence alone. The company is responsible for any degree of neg-

ligence which is sufficient to cause the injury, whether the negligence be called gross or ordinary." Railroad Co. vs. Beebee, 174 Ill., 13; 50 N. E., 1019; 43 L. R. A., 210.

A very recent case and one that is very fully considered is that of Sprigg's Adm'r vs. Rutland Railroad Company found in 60 Atlantic, 143. In discussing a contract similar to the one before the court, the court uses the following very clear and expressive language:

"As to the nature of the contract, we think the caretaker's contract is supplemental to the shipper's contract, and substantially a part of the same transaction, though executed afterwards, and based upon the same consideration, as is shown by its language, which is that, 'in consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the shipper's contract, without charge other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock he is in charge, the undersigned does hereby voluntarily assume,' etc. Substantially the same language is used in the shipper's contract, where, 'in consideration of the premises, and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge other than the sum paid or to be paid for the transportation of the live stock in his or their charge,' the shipper agrees to indemnify the carriers against liability for their negligent injury to the caretaker. This, taken with the fact that the shipper was to feed and care for the cattle while in transit, which necessitated the carriage of a man for that purpose on the same train, and with the further fact that the

> contract nowhere refers to the caretaker's transportation as a free passage, shows that the parties understood in the time of it what their language fairly imports—that the carriage of the man was a part of the contract for the carriage of the cattle, and that the 'sum paid or to be paid' for carrying the cattle was a consideration for carrying the man as well, and, having treated it so then, they are bound by it now."

We deem it important in this connection to call the attention of the court to the cases cited and relied upon by plaintiff in error and by the railroad companies in general in suits of this character and to distinguish them from the principles underlying the Lockwood case and the cases following the ruling in that case.

Cau vs. Texas Pacific R. R., 194 U. S., 427, was a case in which the railroad company sought to exempt its liability for loss by fire in shipping cotton. The court held it could not do so, but cited with approval the Lockwood case and said:

> "There can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. New York C. R. Co. vs. Lockwood, 17 Wall., 357; Bank of Kentucky vs. Adams, 93 U. S., 174."

In the case of the Northern Pacific R. Co. vs. Adams, 192 U. S., 440, Adams rode on a pass as an attorney for several railroad companies, though not of the defendant. In this case there was no consideration moving to the defendant company.

In Grand Trunk R. R. Co. vs. Stevens, 95 U. S., 655, the plaintiff rode on a free pass precisely like the

one in the Adams case, but he was on business for the company. Justice Bradley says:

> "The transportation of the plaintiff in the defendants' cars, though not paid for by him in money, was not a matter of charity, nor of gratuity in any sense. * * * The pass was a mere ticket to show the conductors of the trains, as evidence of his right to be transported therein. It was not evidence of any contract by which the plaintiff was to assume all the risk; and it would not have been valid if it had been. In this respect it was a stronger case than that of Lockwood's."

Mr. Justice Brewer in deciding the Adams case said:

> "He (Adams) was not a passenger for hire, such as was held to be the condition of the parties recovering in the LOCKWOOD and STEVENS cases."

Queen of the Pacific, 180 U. S., 278, was a case of damage to goods shipped and the bill of lading contained a stipulation that all claims for damages must be presented within thirty days. The shippers knew of the loss three weeks before the time expired and the court held that the provision was reasonable. In this case the court, speaking by Mr. Justice Brown, cites the Lockwood case with approval.

Chicago & N. W. Ry. Co. vs. O'Brien is a case of an express messenger, who, the court says, occupies a position analagous to one of the railroad companies' employes, and this position is so apparent as to need no comment.

Baltimore & Ohio S. W. Ry. Co. vs. Voight, 176 U. S., 498, was another express messenger case, and Mr.

Justice Shiras delivered the opinion of the court and said:

> "This court held that a drover traveling on a pass, for the purpose of taking care of stock on the train is a passenger for hire, and that it is not lawful for a common carrier of such passengers to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been frequently followed, and it may be regarded as establishing a settled rule of policy. Grand Trunk R. Co. vs. Stevens, 95 U. S., 655; Liverpool & G. W. Steam Co. vs. Phenix Ins. Co., 129 U. S., 397.
>
> "THE PRINCIPLES DECLARED IN THOSE CASES ARE SALUTARY, AND WE HAVE NO DISPOSITION TO DEPART FROM THEM."

Boering vs. Chesepeake Beach Ry. Co., 193 U. S., 442, was another case of a free passenger who paid nothing for the transportation and rendered the railroad company no service. Justice Brewer in rendering the opinion followed the Adams case, which, as we have already shown, recognizes and distinguished the Lockwood case from the cases of a free pass.

Rogers vs. Kennebec Steamboat Co., 29 Atl., 1069, was the case of a passenger riding on a free pass on a steamboat.

Justice Whitehouse, in rendering the opinion in this case, said:

> "In the great case of Railroad Co. vs. Lockwood, 17 Wall., 357, the Federal Court reached the conclusion that a condition on a 'drover's pass' requiring the person using it to travel at his own risk, was not a valid and ef-

fectual one, and could not exonerate the carrier from liability for negligence. It is important to notice, however, that this decision is put on the ground that a 'drover's pass' was issued as a part of the contract for the carriage of the cattle, and could not be deemed a gratuitous one. At the close of the elaborate opinion in the case is a distinct finding that 'A DROVER TRAVELING ON SUCH A PASS AS WAS GIVEN IN THIS CASE, FOR THE PURPOSE OF TAKING CARE OF HIS STOCK ON THE TRAIN, IS A PASSENGER FOR HIRE." The same doctrine was applied in the later case of Railway Co. vs. Stevens, 95 U. S., 655. There the servant of an inventor obtained a pass to see an officer of the road in regard to the use of a new coupling. * * *

"THESE DECISIONS OF THE FEDERAL COURT, THEREFORE, HAVE NO APPLICATION TO THE PRECISE QUESTION HERE RAISED."

Quinby vs. Boston & Maine R. Co., 150 Mass., 365, is another free pass case; so is Griswold vs. New York, etc., R. R. Co., 53 Conn., 371. Both these cite the Lockwood case and distinguish it from the cases before the court. In the Griswold case the court said:

"We are not disposed to controvert the soundness of these propositions (those stated by Justice Bradley in the Lockwood case), as applicable to passengers for hire. * * * IT SEEMS TO US THE TWO CASES CANNOT BE IDENTICAL IN THE EYE OF THE LAW OR OF PUBLIC POLICY, BUT THAT THERE IS AMPLE GROUND FOR A DISTINCTION."

Payne vs. Terre Haute & I. R. Co., 157 Ind. 616; S. C. 62 N. E. 472, is another 'free pass' case and the court clearly distinguished that case from the case at bar in the following language:

> "In the Selby, Nickless and Faylor cases, *supra,* the plaintiffs were traveling on passes which purported to release the company from damages through their negligence, and the stipulations were held void. But the passes were 'stock drovers'' passes, issued in connection with bills of lading of the shipment of live stock, which the plaintiffs were to accompany and care for. The usual rates were paid and the court properly decided that the transaction was an entirety, that plaintiffs had paid for the transportation of their persons as well as their stock; that the companies stood in the relation of common carriers for hire to plaintiffs as part of the general public; and that therefore the rule which forbade the companies to abandon a duty owing to the general public rendered the waiver void." * * *
>
> Again: "The reasons on which is based the rule that public carriers will not be permitted to evade a public duty wholly fail, for railroad companies are under no obligation to transport the GENERAL PUBLIC GRATUITOUSLY."

The case of Muldoon vs. Seattle City Ry. Co., 7 Washington, 528, is a case of a passenger on a street railway riding on a free pass.

In this case the court said:

> "It is a general rule that carriers of passengers for hire cannot contract against their liability for damages for injuries to their passengers, and this rule has been frequently held

to be none the less operative when the evidence of the passenger's right to travel was put in the form of a free pass, if in fact there was a consideration for its issuance. Railroad Co. vs. Lockwood, and Railway Co. vs. Stevens."

* * *

Again: "There can be no question as to the propriety of that rule of law which prohibits a common carrier from forcing upon any person who deals with it in its public capacity a condition against liability arising from its own negligence. The very idea of a public or common carrier, with its features of monopoly and right of eminent domain, bears with it, to the modern mind, the duty of conveying passengers with safety, so far as its own acts are concerned, upon the payment of reasonable compensation. The duty which the carrier owes to the public and to the individual is to perform the service safely, without any limiting conditions; and, therefore, such conditions, when the imposition is attempted, VIOLATE AN IMPLIED DUTY, AND ARE HELD JUSTLY VOID."

The Cyclopedia of Law and Procedure, Vol. 6, pp. 544 and 545, states the law as follows:

"Persons are, however, frequently transported on so-called passes who are not in fact gratuitous passengers, because the right to ride without payment of special compensation therefor is given in part consideration of payment which is principally for other services. Thus one who travels on a drover's pass, which is issued in connection with the transportation of live stock for hire, is not a free passenger, but a passenger for compensation. And those who are carried on freight trains to look

after live stock which is being transported, and as an incident to such transportation, are entitled to protection as passengers."

Under this paragraph are cited decisions from Del., Ill., Ind., Kentucky, Mo., Ohio, Tex., Ver., Wis., and the United States. There is not a single citation of any authority to the contrary. NOT ONE.

Counsel for plaintiff in error insists that the transportation of Williams, the defendant in error, was a gratuity and that the transportation was separate and apart from the consideration for the carriage of the cattle. This is an error to which we desire to call the attention of the court. The railroad company as one transaction did three things. That is to say, it received certain money, it received cattle for transportation and it received Williams as the man in charge of those cattle, not as a different transaction, but as one and the same transaction; the contract, as well as the necessities of the case, required that some one should be in charge of the cattle. The exeedingly clever and skillful argument of counsel separates this matter into three transactions. They say that the railroad company has assumed to carry the cattle for hire without any agreement to carry the man in charge thereof, either free or in consideration of money paid as freight for the cattle; that they were under no obligations to carry the man at all, except for pay; and that therefore, when they subsequently agreed to carry him for nothing, it was a separate transaction and hence a gratuity. This argument all falls to the ground if the whole is regarded as one transaction, as the evidence shows it was.

The contract in regard to the transportation is as follows:

> "And in consideration of free transportation for one or more person, designated by the first party, hereby given by said Railroad Company, such persons to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said Railway Company shall not be responsible for such attention and care; and, further, that the second party shall not be liable to the first party, or any of his servants, agents or co-partners, or other person, carried pursuant to this contract, for any injury or damage, from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard.
>
> "It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge; that the second party shall not be liable for loss from theft, heat or cold, jumping from car, or other escape, injury in loading or unloading, injury which animals may cause to themselves or to each other, or which results from the nature or propensities of such animals, etc."

We see from this contract that in consideration of the transportation, the owner or person accompanying the stock was to feed and water the same, load and unload and to care for the same, so that the pass was not a "gratuity," but that there was a legal and valid consideration therefor.

But it is claimed there was no consideration in money moving to the railroad company. This is not true, if the contract for the cattle and the contract for the carriage of the man were one and the same transaction, and that they were is evidenced by the fact that the same bill of lading, or live stock contract, of the plaintiff in error contains both stipulations for the carriage of the cattle and the carriage of the man in charge of the cattle. Would the railroad company have carried defendant in error if he had not been in charge of the cattle? If not, was not the freight paid on the cattle the legal consideration for his carriage? It certainly was the real consideration which induced the railroad company to carry the man. Every railroad company which carries a man in charge of cattle, does it to get the business and to secure the freight money. Why then, was it not the legal consideration?

We insist that there is absolutely no difference between this case and the Lockwood case, and that therefore the doctrine announced in the Lockwood case must be affirmed here.

JOHN H. DENISON,
JOHN HIPP,
RALPH TALBOT,
Attorneys for Defendant in Error,
by Permission.

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JAMES H. McKEN

No. 243.

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Plaintiff in Error,*

v.

EDGAR C. WILLIAMS, *Defendant in Error.*

In error to the Circuit Court of the United States for the Western Division of the Western Distrtict of Missouri.

ON CERTIFICATE FROM THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

EIGHTH CIRCUIT.

BRIEF OF DEFENDANT IN ERROR.

D. C. ALLEN,
SANDUSKY & SANDUSKY,
Attorneys for Defendant in Error.

Timothy J. Sullivan

No._____

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Plaintiff in Error,* *v.* EDGAR C. WILLIAMS, *Defendant in Error.*	*In error to the Circuit Court of the United States for the Western Division of the Western District of Missouri.*

ON CERTIFICATE FROM THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

EIGHTH CIRCUIT.

BRIEF OF DEFENDANT IN ERROR.

The question certified by the Circuit Court of Appeals reads as follows:

"Where the owner of cattle has the option

> to ship them to market at the same rate without free transportation for himself or his agents on the cattle train, to throw the entire responsibility of the care of the cattle during the transportation upon the railroad company, and to travel to the market town on a passenger train of that company for the regular fare, or to accept free transportation to the market town upon the cattle train which carries his cattle, to assume the responsibility of their care during the transportation, and to agree that the railroad company shall not be liable to him for any injury or damage which he sustains while he is being so carried, and without request, requirement or restraint he voluntarily chooses the latter alternative, is his contract that the railroad company shall not be liable to him for such injury or damage, valid?"

The question certified seems to be directly answered by the opinion of the Supreme Court of the United States in the leading case of

N. Y. C. R. Co. v. Lockwood, 17 Wallace, 357.

There can be no mistake as to what was decided in this case, for the court states the question presented thus:

> "The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage."

After an exhaustive discussion it was held that a common carrier cannot stipulate for exemption from respons-

ibility for its negligent injury to a *passenger for hire.*

And it was further held:

> "4. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire."

The court in conclusion say:

> "We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a *free passenger*, instead of a *passenger for hire.*"

It has since been ruled that such stipulation is valid in case of a *free passenger.*

N. P. R. Co. v. Adams, 192 U. S., 439.

But in this last case the court expressly *recognizes* the *authority* of the Lockwood case.

In Liverpool Steam Co. v. Phœnix Ins. Co., 119 U. S., 397, Mr. Justice Gray, after giving an analysis of the opinion in the Lockwood case, says:

> "This analysis of the opinion in Railroad Co. v. Lockwood shows that it affirms and rests upon the doctrine that an express stipulation by any *common carrier for hire*, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself, or his servants, is unreasonable and contrary to public policy, and consequently void. And such has always been the understanding of this court, expressed in several later cases."

And in B. & O. S. W. R'y Co. v. Voigt, 176 U. S., 505, the court, in distinguishing the Lockwood case, and stating the matter decided in that case, said:

> "This court held that a drover traveling on a pass, for the purpose of taking care of his stock on the train, is a *passenger for hire*, and that it is not lawful for a common carrier of *such passenger* to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been *frequently followed*, and it may be regarded as *establishing a settled rule of policy*."

It seems, then, to be clearly held by this court:

1st. That the owner of the cattle, under the facts assumed in the question certified, is a *passenger for hire*.

2nd. That a stipulation for exemption from liability for negligent injury to such passenger is invalid.

Looking at the question from the stand-point of reason:

Here is a written contract; this contract is a unit, and must be taken in its entirety; we cannot segregate the *clause* as to the *drover's transportation* from the *other mutual agreements*, and say that as to *this clause* there was *no consideration*.

The drover's transportation is, in the language of the Lockwood case, "one of the mutual terms of the arrangement for carrying the cattle."

This drover is not a mere licensee, riding by permission, for pleasure; he is *transacting business* with the railway company, out of which business the company

derives a profit; in the transaction of this business, and as a part of the arrangement, he stipulates to assume the care of the cattle during transportation, and thereby not only assumes an onerous burden, and relieves the company of this labor, but likewise relieves the company of liability for damage to the cattle growing out of want of proper care and attention.

From these facts the conclusion seems inevitable that the defendant in error was a *passenger for hire*. If so, the Lockwood case holds that the clause exempting the company from liability for negligently injuring him is invalid; and the Voigt case declares that the Lockwood case, in this ruling, "may be regarded as establishing a settled rule of policy."

The form of the question certified seems to indicate that the Circuit Court of Appeals had in mind the concluding remarks in the opinion of Mr. Justice Brewer in the Adams case.

That it was not the intention of the court, in the Adams case, to overthrow the "settled rule of policy" on this subject, established by prior cases, is clear from the fact that Mr. Justice Brewer, in his opinion, says:

> "He (Adams) was *not a passenger for hire*, such as was held to be the condition of the parties in the Lockwood and Stevens cases."

The written contract entered into by these parties cannot be shorn of its plain legal effect, because it was in the *power* of the *drover* to have *made some other contract*.

He is entitled to the protection of the law applicable

to the contract which he *did make*, and under which *both parties acted;* and it may be that he "voluntarily chose" to make this contract, because repeated decisions of the Supreme Court of the United States had established a "settled rule of policy" that the clause in this contract stipulating non-liability for negligence was invalid.

The Lockwood case does not rest upon the idea that technical *duress* was used in making the contract; what was said along this line was said *arguendo* upon the question of *public policy*.

The decision rests squarely upon reasons of public policy, among which the court states: that the employment of the common carrier is a public one, "charging him with the duty of accommodating the public in the line of his employment"; and that the "whole business community" is affected by the "individual contracts" he is permitted to make; and, in the language of the syllabus, "7. That *carefulness* and *fidelity* are *essential duties* of his *employment*, which *cannot be abdicated.*"

In addition to the authorities cited in the Lockwood case, the later authorities are collected in the able and elaborate brief filed in this cause, on behalf of defendant in error, by Messrs. Denison, Hipp and Talbot, the consideration of which is respectfully asked.

Respectfully submitted:

D. C. ALLEN,

SANDUSKY & SANDUSKY,

Attorneys for Defendant in Error.

Timothy J. Butler

of Counsel

Supreme Court of the United States.

No. 243.—October Term, 1906.

Chicago, Burlington and Quincy Railway Company
vs.
Edgar C. Williams.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[April 15th 1907.]

This case is before the court upon a question certified by the Circuit Court of Appeals under the 6th section of the Judiciary Act of March 3d 1891, providing that in every case within its appellate jurisdiction a Circuit Court of Appeals may certify to this court any questions or propositions of law concerning which it desires instruction for the proper decision of such case. 26 *Stat.* 826, *c.* 517.

Accompanying the certificate is a detailed statement of the case as disclosed by the evidence. It is well to give that statement in full. It is as follows:

"The judgment which the writ of error challenges was rendered after a trial and a verdict of a jury for $5,000 damages caused to the defendant in error, who will hereafter be called the plaintiff, by the negligence of the servants of the railway company, the defendant below, in the operation of a cattle train, in the caboose of which the plaintiff was riding under this contract:

Burlington Route.

Live Stock Contract.

Issued by Chicago, Burlington & Quincy Railway Company.

"Agents of this company are not authorized to agree to forward Live Stock to be delivered at any specified time or for any particular market.

"Agents will permit only the names of the owners or *bona fide* employes, who accompany the stock, to be entered on the back of the contract without regard to passes allowed by number of cars.

"The Contract when endorsed by the person or persons in charge and signed in ink by agent, will entitle such person or persons to ride on same train with stock to care for same, but will not entitle holder of contract to ride on any other train, nor will contract be accepted for passage on any passenger train.

"Conductor of freight train must punch contract, or in absence of punch will endorse his name on back of Contract when presented for passage.

"Live Stock Contracts are not good for return passage. Parties entitled to return passage will be provided with return ticket on application to proper office. Conductors will be held strictly responsible for permitting persons to ride on stock contracts, except when in charge of Live Stock.

No. of waybill.	No. and initial of car.	No. of animals in each car.
42	50043Q	17
43	16168Q	17

Read the Contract.

ROBERTSON, MO., STATION.

"This Contract, made and entered into this 26 day of Sep., 1903, by and between Ed Williams of Robertson, of the first part, and the Chicago, Burlington & Quincy Railway Company of the second part.

"Witnesseth, That for and in consideration of 23½ per cwt., subject to minimum weights as shown in published tariffs, the said Railway Company agrees to transport 2 cars loaded with cattle (number of cars, number of waybill, and number of animals as noted above), from Robertson to U. S. yds. consigned to Drumm Com. Co.; and the said first party in consideration thereof, agrees to deliver the said animals, to the said Railway Company, for transportation between the points aforesaid upon the following terms, viz.:

"That whereas, the said first party, before delivering the said animals to said Railway Company, demanded to be advised of the rate to be charged for the carriage of said animals, as aforesaid, and thereupon was offered by the said Railway Company alternative rates proportionate to the value of the said animals, such value to be fixed and declared by the first party or his agent, and

"Whereas, such alternative rates are made in pursuance of the provisions relating thereto of the classification of freights adopted as regulations by the said Railway Company, and fully set forth as follows, to-wit:

"Live Stock.—Ratings given above are based upon declared valuations by shippers, not exceeding the following:

Each Horse or Pony (Gelding, Mare or Stallion), Mule or Jack..	$100 00
Each Ox, Bull or Steer	50 00
Each Cow	30 00
Each Calf	10 00
Each Hog	10 00
Each Sheep or Goat	3 00

"When the declared value exceeds the above, an addition of 25 per cent. will be made to the rate for each 100 per cent. or fraction thereof, of 'additional declared valuation per head;' which said alternative rates are

fully shown in and upon the regular tariffs and classifications printed, published and posted by the said Company as required by law, and

"Whereas, the first party, in order to avail himself of said alternative rates, and to secure the benefit thereof, has declared, and does hereby declare said animals to be of the value as follows, to wit: Each Steer, Value, $50 00."

"To which value the rate aforesaid is proportioned by the classifications and tariffs aforesaid.

"Now, in consideration of the premises and of the foregoing, it is expressly agreed that for all purposes connected with, resulting from, or in any manner growing out of this contract, and the transportation of the said animals pursuant thereto, the value of the said animals and of each thereof, shall in no case exceed the said valuation.

"It is further agreed in consideration of the alternative rate so made by the said Railway Company and accepted by the first party, that in case of loss or of damage to said animals, whether resulting from accident or negligence of said Railway Company, or its servants, the said Railway Company shall not be liable in excess of the actual loss or damage; and in no case shall the said Railway Company be liable in any manner in excess of the agreed valuation upon each animal lost or damaged. Nor shall said Railway Company be liable for loss or damage after delivery to any connecting line, nor for any loss or damage not incurred upon its own line, but nevertheless in the event that the said animals are to be transported beyond the line of the railway of the second party upon and by any connecting line forming a part of the system known as the 'Burlington System' then it is expressly understood and agreed that this contract shall be for and shall inure to the benefit of, the corporation operating such connecting line, and such connecting line shall be liable to perform all the obligations of this contract.

"It is further agreed that the said Railway Company shall in no case be liable for any loss or damage to said animals, unless a claim shall be made in writing by the owner or owners thereof, or his or their agents, and delivered to a General Freight Agent of the said Railway Company, or to the agent of said Railway Company at the station from which the animals are shipped, or to the agent at the point of destination, within ten (10) days from the time the said animals are removed from the cars. And in case of loss or damage upon any connecting line, such connecting line shall not be in any manner liable unless claim shall be made in like manner in writing to such general officer or agent of such connecting line.

"*And in consideration of free transportation for one person, designated by the first party, hereby given by said Railway Company, such persons to accompany the stock, it is agreed that the said cars, and the said animals*

contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals. and that the said Railway Company shall not be responsible for such attention and care; and, further, that the second party shall not be liable to the first party, or any of his servants, agents or copartners, or other person, carried pursuant to this contract, for any injury or damage, from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard.

"*It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agent in charge;* that the second party shall not be liable for loss from theft, heat or cold, jumping from car, or other escape, injury in loading or unloading, injury which animals may cause to themselves or to each other, or which result from the nature or propensities of such animals, and that the Railway Company does not agree to deliver the stock at destination at any specified time, nor for any particular market.

"Witness the name of the Railway Company by its Agent, and the hand of the first party, the day and year first above written.

CHICAGO, BURLINGTON & QUINCY
RAILWAY COMPANY,
By C. M. HOLT, *Agent.*

ED. WILLIAMS, *Shipper.*

"If this contract is for two or more cars, and is presented to the Company's Agents at the below named addresses within 3 days from date, it may be exchanged for a return pass for the above named party in charge, it being distinctly understood that said pass must be used the same day as issued.

Atchison, Kans., General Agent's Office.
Beardstown, Ill., Local Freight Agent's Office.
Burlington, Iowa, Division Freight Agent's Office.
Chicago, Ill., General Freight Office, Union Stock Yards.'

"The defendant pleaded that it was exempt from liability for damages to the plaintiff by virtue of the italicized paragraph of the foregoing agreement. At the close of the trial there was substantial evidence that the injury to the plaintiff was caused by the negligence of the defendant's servants in the operation of the cattle train, the evidence relative to the contract between the parties for the free transportation of the plaintiff was uncontradicted and it established these facts: The plaintiff resided at Robertson in the State of Missouri. He had been engaged in dealing in and shipping cattle in that State for eighteen years, had frequently made

contracts of the character of that here in evidence and was familiar with this agreement, and with the rates and terms upon which the Railway Company transported cattle from Robertson to the city of Chicago. The defendant operated regular passenger trains and carried passengers thereon between these stations for a regular fare of about $12. The danger of accident and injury to one riding in the caboose of a cattle train is about four times the danger to one riding in a coach of a passenger train. The defendant offered to carry and did transport cattle from Robertson to Chicago and between other places on its railroad and assumed the entire responsibility and care of them during the transportation, without furnishing free transportation to the shipper or any of his agents and without any agreement that he or any of his agents should water, feed or give care or attention to the cattle during the transportation, for the same price and rate as it charged and received in cases in which the owner or his agent received free transportation upon the cattle train and agreed to assume the responsibility of the care of the cattle and the risk of his own injury while riding upon the freight train, as he did in the contract in evidence. The railway company preferred to carry and care for the cattle without furnishing transportation to any one upon the freight trains, but nevertheless it offered to provide, and when desired did provide free transportation on the cattle train for one person for every two cars shipped upon the terms specified in the italicized paragraph of the agreement. Cattle were shipped each way. The railway company charged and received the same rate whichever method was adopted and left the shippers free to make their choice. The majority of the shippers accepted the free transportation on the train with their cattle and agreed to care for them and to hold the company exempt from liability for any injury to themeslves while they were riding on the freight train. The plaintiff and other shippers had the option to ship their cattle without free transportation for any one and to throw the entire care of the cattle on the company, or to accept the free transportation and to make the agreement to care for their cattle during the transportation and to exempt the defendant from liability for their injuries while riding on the cattle train. The plaintiff was not requested, required or constrained to accept the free transportation upon the cattle train upon which he rode, to assume the care of the cattle during their carriage or to ride on the cattle train and to agree that the defendant should not be liable for his injuries while he was so carried, but he did so voluntarily because he wished to accompany his cattle to Chicago and to sell them there. In this state of the case the trial court denied the request of counsel for the defendant to instruct the jury to return a verdict in its favor, an exception was taken to this ruling and it was assigned as error.

"And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following question of law is presented by the assignment of errors in this case, that its decision is indispensable to a determination of this case and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following question:

"Where the owner of cattle has the option to ship them to market at the same rate without free transportation for himself or his agents on the cattle train, to throw the entire responsibility of the care of the cattle during the transportation upon the railroad company and to travel to the market town on a passenger train of that company for the regular fare, or to accept free transportation to the market town upon the cattle train which carries his cattle, to assume the responsibility of their care during the transportation and to agree that the railroad company shall not be liable to him for any injury or damage which he sustains while he is being so carried, and without request, requirement or constraint he voluntarily chooses the latter alternative, is his contract that the railroad company shall not be liable to him for such injury or damage valid?"

Mr. Justice HARLAN delivered the opinion of the Court.

In *Jewell* v. *McKnight*, 123 *U. S.* 426, 432, 434, 435, the court had occasion to determine the scope of those provisions of the Revised Statutes which authorized the judges of the Circuit Court in any civil suit or proceeding before it where they were divided in opinion, to certify to this court the point upon which they so disagreed. *R. S.* §§ 650, 652, 693. Speaking by Mr. Justice Gray, this court held that each question certified must be a distinct point or proposition of law clearly stated, so that it could be definitely answered, without regard to other issues of law or of fact in the case. It said: "The points certified must be questions of law only, and not questions of fact, or of mixed law and fact—'not such as involve or imply conclusions or judgment by the court upon the weight or effect of testimony of facts adduced in the cause.' . . . The whole case, even when its decision turns upon matter of law only, cannot be sent up by certificate of division." In that case the general creditors of one of the parties sought to set aside, as fraudulent, a warrant of attorney to confess judgment. The court further said: "The statement (embodied in the certificate and occupying three closely printed pages in the record) of what the judges below call 'the facts found' is in truth a narrative in detail of various circumstances as to the debtor's pecuniary condition, his dealings with the parties to this suit and with other persons, and the extent of the preferred creditors' knowledge of his condition and dealings. It is not a

statement of ultimate facts, leaving nothing but a conclusion of law to be drawn; but it is a statement of particular facts, in the nature of matters of evidence, upon which no decision can be made without inferring a fact which is not found. The main issue in the case, upon which its decision must turn, and which the certificate attempts in various forms to refer to the determination of this court, is whether the sale of goods was fraudulent as against the plaintiffs. That is not a pure question of law, but a question either of fact or of mixed law and fact. . . Not one of the questions certified presents a distinct point of law; and each of them, either in express terms or by necessary implication, involves in its decision a consideration of all the circumstances of the case. . . 'They are mixed propositions of law and fact, in regard to which the court cannot know precisely where the division of opinion arose on a question of law alone;' and 'It is very clear that the whole case has been sent here for us to decide, with the aid of a few suggestions from the circuit judges of the difficulties they have found in doing so.' *Waterville* v. *Van Slyke*, 116 *U. S.* 699, 704." See also *Fire Asso.* v. *Wickham*, 128 *U. S.* 426, 434.

In *United States* v. *Rider*, 163 *U. S.* 132, the Chief Justice, speaking for the court, said that "it has always been held that the whole case could not be certified," and that "under the Revised Statutes, as to civil cases, the danger of the wheels of justice being blocked by difference of opinion was entirely obviated." In that case it was also held that certificates of questions of law by the Circuit Courts of Appeals under the Judiciary Act of March 3d 1891 are governed by the same general rules as were formerly applied to certificates of division of opinion in the Circuit Court—citing *Columbus Watch Co.* v. *Robbins*, 148 *U. S.* 266; *Maynard* v. *Hecht*, 151 *U. S.* 324.

In *United States* v. *Union Pacific Railway*, 168 *U. S.* 505, 512, (which was the case of certified questions from a Circuit Court of Appeals,) the rule as announced in the *Rider case* was affirmed. To the same effect are *Graves* v. *Famot*, 162 *U. S.* 435, 436; *Cross* v. *Evans*, 167 *U. S.* 60, 64; *McHenry* v. *Alford*, 168 *U. S.* 617, 658.

The present certificate brings to us a question of mixed law and fact and, substantially, all the circumstances connected with the issue to be determined. It does not present a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of all the evidence out of which the question arises. The question certified is rather a condensed, argumentative narrative of the facts upon which, in the opinion of the judges of the Circuit Court of Appeals, depends the validity of the live-stock contract in suit. Thus, practically, the whole case is brought here by the certified question, and we are, in effect, asked to indicate what, under all the facts stated, should be the final judgment. It is, obviously, as if the court

had been asked, generally, upon a statement of all the facts, to determine what, upon those facts, is the law of the case. We thus state the matter, because it is apparent that the case turns altogether upon the question propounded as to the validity, in view of all the facts stated, of the contract under which the plaintiff's cattle were transported. This court is without jurisdiction to answer the question certified in its present imperfect form and the certificate must be dismissed. *Sadler* v. *Hoover*, 7 *How.* 646.

It is so ordered.

Mr. Justice BREWER dissented.

True copy.

Test:

Clerk Supreme Court, U. S.